No. S184583

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

v.

JACK O'CONNELL, AS SUPERINTENDENT
OF PUBLIC INSTRUCTION, et al.,
Defendants and Appellants;

AMERICAN DIABETES ASSOCIATION,
Intervener and Appellant.

On Appeal From Decision Affirming Judgment on Petition for Writ of Mandate
Court of Appeal, Third Appellate District, No. C061150

On Appeal From Judgment on Petition for Writ of Mandate
Sacramento County Superior Court, No. 07AS04631
The Honorable Lloyd G. Connolly, Presiding

APPLICATION OF STATE SUPERINTENDENT OF PUBLIC INSTRUCTION TOM TORLAKSON AND CALIFORNIA DEPARTMENT OF EDUCATION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT AMERICAN DIABETES ASSOCIATION; BRIEF AMICUS CURIAE

Robin B. Johansen, State Bar No. 79084
Kari Krogseng, State Bar No. 215263
REMCHO, JOHANSEN & PURCELL, LLP
201 Dolores Avenue
San Leandro, CA 94577
Phone: (510) 346-6200
Fax: (510) 346-6201
Email: rjohansen@rjp.com

Attorneys for Amici Curiae
State Superintendent of Public Instruction
Tom Torlakson and California Department
of Education

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APPLICATION TO FILE BRIEF AMICUS CURIAE

INTRODUCTION

Pursuant to Rule 8.520(f) of the California Rules of Court, State Superintendent of Public Instruction Tom Torlakson and the California Department of Education ("CDE") request permission to file the accompanying amicus brief in support of Petitioner/Appellant American Diabetes Association ("ADA").

THE AMICI CURIAE

State Superintendent of Public Instruction Tom Torlakson is a state constitutional officer who was elected to a four-year term by the people of California on November 2, 2010, and assumed office on January 3, 2011. The Superintendent is the chief of California's public school system and leader of the CDE. His predecessor, Jack O'Connell, was named as a defendant in this case in the trial court below and joined Appellant ADA's briefs in the Court of Appeal.

The California Department of Education oversees the state's public school system, which is responsible for the education of more than six million children and young adults in over 1,000 school districts and more than 9,900 schools. The CDE and the State Superintendent of Public Instruction are responsible for implementing education law and regulations – including Education Code section 49423, which is at issue in this appeal – and state and federal disability laws applicable to public school students. They are also responsible for continuing to reform and improve public elementary school programs, secondary school programs, adult education, some preschool programs, and child care programs. The CDE's mission is to provide leadership, assistance, oversight, and resources so that every Californian has access to an education that meets world-class standards.

The CDE was also named as a defendant in this case in the trial court below and joined Appellant American Diabetes Association (ADA)'s briefs in the Court of Appeal.

Neither the Superintendent's predecessor nor the CDE joined the ADA's petition for review.[1]

INTEREST OF AMICI CURIAE

"[T]he Superintendent of Public Instruction is responsible for providing leadership to local agencies to ensure that the requirements of . . . nondiscrimination laws and their related regulations are met in educational programs that receive or benefit from state or federal financial assistance and are under the jurisdiction of the State Board of Education." (Cal. Code Regs., tit. 5, § 4902.) These nondiscrimination laws include Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973, which together protect students from discrimination based upon their disabilities and insure students' rights to receive a free appropriate public education, and the Individuals with Disabilities Education Act ("IDEA"), which insures children with disabilities are provided a free appropriate public education that emphasizes special education. (*Id.*; 20 U.S.C. § 1400 et seq.; 42 U.S.C. § 12132 et seq.; 29 U.S.C. § 794; 34 C.F.R. § 104.33; Gov. Code, § 11135 et seq. [incorporating the Americans with Disabilities Act and prohibiting

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[1] No party or counsel for a party authored the proposed brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, except for Amici Curiae and their counsel.

discrimination based on disability under any state-funded program or activity]; Ed. Code § 56000 et seq. [incorporating the IDEA into state law].)[2]

The Superintendent and the CDE are also responsible for implementing and monitoring California school districts' compliance with Section 504 and Education Code section 56363, which requires that health and nursing services be provided to eligible students when necessary. (*See, e.g.*, Ed. Code, § 56136; Gov. Code, § 11135 et seq.; Cal. Code Regs., tit. 5, § 4902; *see also* 42 U.S.C. § 12132; 34 C.F.R. §§ 300.149-300.150, 300.600-300.602, 300.606-300.608.) They are also, of course, responsible for implementing provisions of the Education Code, including section 49423, which is at the heart of this appeal, and the regulations that interpret it.

Most importantly, CDE and former State Superintendent of Public Instruction Jack O'Connell were parties to the settlement agreement that included the Legal Advisory at issue in this case. (1AA00171-227.) The Legal Advisory provides that when no expressly authorized person like a school nurse or physician, appropriately licensed school employee, or contracted nurse is available, federal law requires that students whose Section 504 plans call for administration of insulin during the school day or at school activities are still entitled to receive it, and a "[v]oluntary school employee who is unlicensed but who has been adequately trained to

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[2] For ease of reference, amici will refer to the state and federal laws regarding disability rights as "Section 504" collectively and to the individualized educational programs that must be developed and implemented under some of those laws as "Section 504 plans."

administer insulin," may administer insulin to students with diabetes with the approval of the students' treating physician and their parents or guardians. (1AA00227.)

As the state entities responsible for providing leadership, implementing, and monitoring state school districts' compliance with federal and state disability laws, as well as for implementing and interpreting provisions of the Education Code like section 49423, the Superintendent and the CDE have a necessary interest in the result of this appeal. As the entities responsible for the Legal Advisory at issue in this case, and the Defendants and Appellants in this action in the courts below, the Superintendent and the CDE also have a particular interest in this Court's decision.

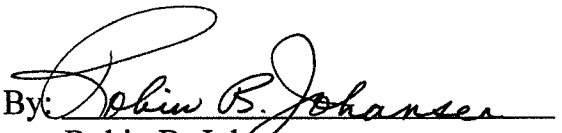
NEED FOR ADDITIONAL BRIEFING

Amici curiae respectfully submit this brief to address (1) the proper way to harmonize Education Code section 49423's provision that unlicensed school personnel may administer medication to students pursuant to parental permission and explicit physician's orders with the Nursing Practice Act, Business and Professions Code section 2725 et seq.; and (2) the challenges facing California schools in providing free appropriate public education to students with diabetes. To our knowledge, no party has fully addressed these issues in this way in any brief now before the Court.

Dated: May 11, 2011

Respectfully submitted,

REMCHO, JOHANSEN & PURCELL, LLP

By: 
Robin B. Johansen

Attorneys for Amici Curiae
State Superintendent of Public Instruction
Tom Torlakson and California Department
of Education

BRIEF AMICUS CURIAE

INTRODUCTION

State Superintendent of Public Instruction Tom Torlakson has long been an advocate for a nurse in every California public school if an appropriate funding source can be found. As a member of the California Legislature, he authored a bill to that effect because he believes that California's school children deserve no less. The State Superintendent also has been, and remains, deeply committed to the needs of California's school children who have disabilities and who require special education and related services. As a former teacher himself, he knows how difficult it can be for children and their parents to navigate the rules and procedures of our special education system. Now, as Superintendent of Public Instruction, he is charged with overseeing the implementation of state and federal special education laws.

The State Superintendent is keenly aware, however, of the drastic cuts that have been made in school funding in this state and the even greater cuts that appear certain to come. He is also aware that California, like many other states, is facing a severe nursing shortage that would make it very difficult to place a nurse in every school even if the funds were there to pay for it.

In this case, the State Superintendent's responsibility for special education and his commitment to providing a nurse in every school come up squarely against the twin realities of a state fiscal crisis and a nursing shortage, neither of which is likely to end soon. Federal and state law *require* that students whose special education plans call for administration of insulin at school be provided it. If the student is not able to self-administer insulin, the student's family cannot be required to come

to school to take care of the child or to provide someone who will. Contrary to the "accommodation" arguments made by Respondent, school districts must provide for the administration of insulin to students whose educational plans call for it as part of their right to a free appropriate public education.

This case is about how that requirement can be met. As demonstrated below, it can and should be met using the narrowly drafted terms of a settlement between the California Department of Education and Appellant, the American Diabetes Association. The settlement agreement resolved a federal lawsuit in which students with diabetes and the American Diabetes Association sued the Department and several school districts on the ground that the insulin needs of the students and others like them were not being met by the school districts they attended.

That settlement, memorialized in part in a Legal Advisory, provides that "[w]hen no expressly authorized person is available," such as a licensed physician, school nurse, or vocational nurse, then a "voluntary school employee who is unlicensed but who has been adequately trained to administer insulin pursuant to the student's treating physician's orders" may administer insulin if it is required by the student's Section 504 plan.

The settlement harmonizes California law in order to insure compliance with federal disability rights law. It turns on the Legislature's repeated acknowledgement, both in the Business and Professions Code and in the Education Code, that the treating physician is the best person to determine whether a drug can be routinely administered by a trained, unlicensed person to a particular patient. Thus, the settlement recognizes that Education Code section 49423 makes the treating physician the gatekeeper who will determine whether a particular student can receive

medication from a trained, unlicensed volunteer or whether the medication itself, the student's particular clinical condition, or both, require that it be administered by a nurse. In the case of insulin, the record is clear that for a vast majority of students, the drug can be, and is, safely administered by a lay person. For those whose condition requires special expertise, the physician can specify that insulin must be administered by a licensed nurse, and the school district will be required to provide one.

Although the settlement agreement was negotiated before he took office, the current Superintendent recognizes that if the decisions below are upheld, school districts in this state will be required to supply a nurse to administer medication to every student whose Section 504 plan calls for insulin, whether or not insulin could be given by someone else. Because of the nursing shortage and increasing incidence of diabetes in the school age population, the requirement may be impossible to fulfill, even if the State had the funds to pay for it. Moreover, as the American Diabetes Association's briefs make clear, even a school nurse will sometimes be otherwise occupied when a student needs insulin, either because the nurse is attending to another student or the student with diabetes is away from school on a school-sponsored activity such as a field trip. As their workloads increase, school nurses should be able to rely on trained, unlicensed personnel to administer insulin. The availability of such help will not only free up nurses to perform other functions, but in today's school environment, it will make all the difference between many students' state and federal rights being met or denied.

The State Superintendent has nothing but admiration for California's school nurses. He knows that they labor under difficult conditions and firmly believes that they have only the students' best

interests at heart. In this narrow situation, however, he respectfully disagrees with their interpretation of state and federal law.

ARGUMENT

I.

THE NURSING PRACTICE ACT AND SECTION 49423 CAN AND SHOULD BE HARMONIZED TO COMPLY WITH STATE AND FEDERAL DISABILITY RIGHTS LAWS

This case requires the Court to construe two California statutes. One, section 2727 of the Business and Professions Code, governs the nursing profession generally and was last amended in 1943. The other, Education Code section 49423, governs the administration of medication in public schools; its predecessor statute was passed in 1968.[3]

Amici join in the arguments made by Appellant about the proper interpretation of each of these statutes and will not repeat those arguments here. Instead, Amici will focus on how the two statutes can and should be harmonized, particularly in light of state and federal law that guarantees the right of all California students to the services they need in order to obtain a free appropriate public education. (*Cal. ARCO Distributors, Inc. v. Atlantic Richfield Co.* (1984) 158 Cal.App.3d 349, 359, footnote omitted ["State and federal laws should be accommodated and harmonized where possible so that preemption can be avoided."].)

A. The Language of the Two Statutes Is Easily Harmonized

Education Code section 49423 provides that "any pupil who is required to take, during the regular schoolday, medication prescribed for

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[3] Stats. 1943, ch. 573, § 1; Stats. 1968, ch. 681, p. 1378.

him or her . . . may be assisted by the school nurse or other designated school personnel," provided the school district obtains a detailed written statement from the student's physician about the timing and dosage of the medication and a written request from the parent or guardian that school personnel assist the child "in the matters set forth" in the physician's statement. Section 49423 places no restrictions on the type or method of administration of medication that may be "set forth" in the physician's statement, nor does it distinguish between school nurses and "other designated school personnel."

Business and Professions Code sections 2725 et seq. prohibit unlicensed persons from engaging in the practice of nursing and define the practice of nursing as "those functions . . . that require a substantial amount of scientific knowledge or technical skill, including . . . the administration of medications and therapeutic agents, necessary to implement a treatment, disease prevention, or rehabilitative regimen ordered by and within the scope of licensure of a physician, dentist, podiatrist, or clinical psychologist, as defined by Section 1316.5 of the Health and Safety Code." (Bus. & Prof. Code, § 2725(b)(2).) The Nursing Practice Act clearly exempts from this definition "[t]he performance by any person of such duties as required in the physical care of a patient and/or carrying out medical orders prescribed by a licensed physician; provided, such person

shall not in any way assume to practice as a professional, registered, graduate or trained nurse." (Bus. & Prof. Code, § 2727(e).)[4]

Thus, both Education Code section 49423 and Business and Professions Code section 2727 identify the treating physician as having the critical role in determining what therapeutic measures – in this case, medication – should be given to a patient and by whom. Beyond that, the two provisions have very different scopes and purposes. As Appellant has demonstrated, the Nursing Practice Act provision is meant to describe generally the scope of the practice of nursing. It is found in that part of the Business and Professions Code dealing with licensure for all types of members of the medical profession, and it is designed to protect the public from individuals who hold themselves out as registered nurses when they are not.

Education Code section 49423, by contrast, is a more specific provision dealing with the routine administration of medication in public schools. Unlike Business and Professions Code section 2727, section 49423 recognizes that medication can be provided by "the school nurse *or other designated school personnel*," provided both the treating

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[4] The Nursing Practice Act contains a number of similar exceptions. (*See* Bus. & Prof. Code, § 2727(a) [NPA does not prohibit gratuitous nursing by friends or family members]; Bus. & Prof. Code, § 2727(b) [NPA does not prohibit the "[i]ncidental care of the sick by domestic servants or by persons primarily employed as housekeepers as long as they do not practice nursing within the meaning of this chapter"]; Bus. & Prof. Code, § 2731 [NPA does not prohibit nursing or the care of the sick, with or without compensation or personal profit, by adherents of any well recognized church or denomination, "so long as they do not otherwise engage in the practice of nursing"].)

physician and the student's parent or guardian agree. (Ed. Code, § 49423(a), (b), emphasis added.)

As noted above, the two provisions have one very important thing in common: Consistent with section 2727(e), Education Code section 49423 relies on the treating physician to make the determination as to whether a patient should be given medication at school and if so, by whom, when, and in what amounts. It is important to remember the context in which this determination is made. By definition, it involves a student who is well enough to attend school, but who needs help with the administration of a drug that is routinely provided for him or her. This is *not* an acute care setting or even a clinical setting of any kind; it is a school. In the case of insulin, administration of the medication occurs just as it would at home or in any other everyday setting.

This difference distinguishes the situation in the home or the school setting from the administration of medication by unlicensed individuals at issue in *Kolnick v. Bd. of Medical Quality Assurance* (1980) 101 Cal.App.3d 80. Although the facts in that case were not entirely clear and the court's discussion of section 2727(e) was only cursory, it appears that the physician who was subject to discipline had been allowing an unlicensed individual to give injections in a clinical setting when the Board of Medical Quality Assurance felt it was inappropriate. The issue was the physician's judgment in allowing such injections in a clinical setting, not whether the unlicensed individual was violating the Nursing Practice Act.

Here, section 49423 permits administration of *regularly prescribed* medications that the physician has determined can be taken safely by the patient by himself or with the aid of a family member on a regular basis. In this sense, insulin is no different from other drugs, such as

antibiotics or antidepressants, that a student may need to take both at home and at school.

Respondents, however, argue that insulin is different, because it must be administered by injection and there may need to be dosage adjustments. (Respondents' Answer Brief on the Merits ["Resp. Br."] at 28.)[5] First, as the record makes clear, insulin can be administered without traditional injections. Many students use an insulin pump that requires only the press of a button. (6AA01430-1431.) Second, it is important to remember that when insulin is injected in the school setting, it is only done subcutaneously, not as an intra-muscular injection, and it is done routinely. (3AA00714.) This kind of administration contrasts sharply with the injection of glucagon in an emergency situation when a student with diabetes has severely low blood sugar, which Education Code section 49414.5 specifically provides can be done by unlicensed personnel. Because glucagon, unlike insulin, must be injected under the stress of an emergency, it is understandable that the Legislature would use a separate statute to delineate the procedures for administering it.[6]

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[5] Interestingly, Respondents have abandoned their earlier position that counting carbohydrates and monitoring physical activity in order to know when to give insulin requires the skill and knowledge of a licensed nurse. (*Compare* 1AA00163 *with* Respondents' Appellate Brief at 5-6.) In their brief in this Court, they now argue that those are ways that unlicensed personnel may "assist" a student with diabetes short of administering the drug itself. (Resp. Br. at 28.)

[6] The administration of glucagon requires the mixing of powdered and liquid medications and then injecting a large syringe into the unconscious or seizing student. (6AA01428.)

Finally, and most importantly, the Legislature has recognized that even school children can self-administer insulin. Education Code section 49414.5(c) provides that if their health care providers and parents agree, students with diabetes who are able may self-test "and otherwise provide diabetes self-care in the classroom, in any area of the school or school grounds, during any school-related activity, and, upon specific request by a parent or guardian, in a private location." Surely if the Legislature felt that administration of insulin requires so much skill and knowledge that only a licensed nurse could do it, it would not have allowed students themselves to do it "in any area of the school or school grounds" with their physician's consent.

There is additional evidence in related statutory language and regulations adopted to implement section 49423. In 2000, the Legislature expressly required the Department of Education and the State Board of Education to "adopt regulations, regarding the administration of medication in the public schools pursuant to Section 49423" to address situations where parents have requested a school to "dispense medicine to a pupil." (Ed. Code, § 49423.6.) The Legislature did not differentiate between "administering" medication and "assisting with" the administration of medication, as Respondents argue should be done in interpreting section 49423, nor did it distinguish between school nurses and "other designated school personnel." It simply ordered the Department to consult with interested individuals, including parents, the medical and nursing professions, and the Advisory Commission on Special Education, in order to develop regulations about administering medication in the schools. (*Id.*)

In response, the Department of Education promulgated Regulation 604(b) to provide that "[o]ther designated school personnel may

administer medication to pupils or otherwise assist pupils in the administration of medication as allowed by law and, if they are licensed health care professionals, in keeping with applicable standards of professional practice for their license." (Cal. Code Regs., tit. 5, § 604(b).)[7] The regulation clearly contemplates that non-licensed school personnel may *administer* medication, not just assist with administering it.[8] If it did not, there would be no need for the second clause that begins "and, if they are licensed health care professionals . . . ." Similarly, the reference to "other designated school personnel" administering medication "as allowed by law" incorporates the requirements of section 49423 that the physician provide a detailed statement regarding the "name of the medication, method, amount, and time schedules by which the medication is to be taken" and that the parents request that it be provided in writing. (Ed. Code, § 49423(b)(1).)

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[7] Regulation 601(e) defines "other designated school personnel" to include personnel who have "consented to administer the medication to the pupil or otherwise assist the pupil in the administration of medication" and may legally do so. (Cal. Code Regs., tit. 5, § 601(e).)

[8] Respondents make much of a nonbinding May 2005 "Program Advisory on Medication Administration" issued by CDE, suggesting that unlicensed school personnel should not administer medication by injection, unless in an emergency. (Resp. Br. at 29-31.) Respondents fail to note that the program advisory recommended "that the Title 5 regulations and this advisory serve as a guide to LEAs in administering medications to students with IEPs and Section 504 plans as long as the regulations or the advisory do not conflict with the student's individually determined plan," citing the IDEA and Section 504. That, of course, is precisely the situation at issue in this case. The Legal Advisory at issue here is limited to administration of insulin to students whose Section 504 plans and physicians' orders call for it.

These regulations have been in effect since 2003. The statutory mandate required that they be developed with input from the nursing profession and even provided that the Board of Registered Nursing "may designate a liaison to consult with the Board of Education in the adoption of these regulations." (Ed. Code, § 49423.6.) No one has challenged the regulations or suggested that they go beyond the scope of section 49423 by allowing unlicensed school personnel to "administer" medication, as opposed to merely assisting in its administration. That failure in itself is testament to the fact that section 49423 can and should be interpreted to allow a student's treating physician to decide that unlicensed school personnel can safely administer insulin to the student.

B. The Legislative History of Section 49423 Confirms That It Should Be Interpreted to Permit Unlicensed Personnel to Administer Insulin

The legislative history of section 49423 also demonstrates that the Legislature intended to allow doctors to decide whether unlicensed personnel can administer medications like insulin.

When it passed Education Code section 49423, the Legislature was aware that even in 1968 there were not enough licensed health professionals in our schools to meet the needs of every child all the time. The Assembly Education Committee analysis for AB 1066, which added section 49423's predecessor to the Education Code, noted that without the legislation, "some children will be required either to leave school during the day for necessary medication, or their parents will be required to pay extra sums for a school visit by the physician." (Amici's Request for Judicial Notice ["RJN"], Exh. A.) In a letter urging then-Governor Reagan to sign AB 1066, the bill's author, Assemblyman

Shoemaker, told the Governor: "I feel this legislation is most desirable as it is not practical for most school districts to have a school nurse available at all times to handle this duty." (*Id.*, Exh. B.)

The Assembly analysis also demonstrates that, unlike Respondents, the Legislature that passed the bill did *not* differentiate between "assisting" and "administering" medication or between licensed and unlicensed personnel. Thus, the analysis begins by saying that the bill "[p]ermits school districts to assist in administering medication to a student during the school day," and it summarizes the arguments in favor of the bill by saying, "The bill allows an orderly plan for administering medication." (RJN, Exh. A.)

Mr. Shoemaker's letter confirms this interpretation:

> It is the school's desire to keep every child in school who can possibly attend, and if the child needs medication and *it is not possible for the school to have a nurse in attendance at all times*, we want to maintain a situation where we will not be held legally responsible for administering the medication which is necessary to keep the child in school. This is particularly applicable to the physically handicapped and mentally retarded who attend special classes in regular schools.
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> (*Id.*, Exh. B, emphasis added.)

Thus, the legislative history demonstrates that section 49423 was intended to fill a gap because "it is not possible for the school to have a nurse in attendance at all times . . . ." (*Id.*) The bill was intended, therefore, to permit someone other than a school nurse to administer "the medication which is necessary to keep the child in school." (*Id.*) And to the Legislature's credit, it was particularly intended to allow special needs

students to obtain a free appropriate public education even before federal law required it.[9]

Nothing in the legislative history suggests that the scope of Education Code section 49423 was in any way limited by the Nursing Practice Act, which had been in effect for almost 30 years by the time AB 1066 was passed. (*See* Stats. 1939, ch. 807, § 2.) To the contrary, the staff analysis prepared for the Senate Committee on Education specifically stated: "There exists no provision directly applicable to the subject matter of this measure. Therefore, inasmuch as authority is not specifically granted by the Education Code, school personnel may not perform actions considered by this measure." (RJN, Exh. C.)[10]

The members of the Legislature, therefore, approved AB 1066 on the understanding that "[t]here exists no provision directly applicable to the subject matter of this measure." (RJN, Exh. C.) That statement includes the Nursing Practice Act, of which the members of the

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[9] Section 504 of the Rehabilitation Act, which was the first of the federal statutes at issue in this case to be passed, was not enacted until 1973. (29 U.S.C. § 794; Pub. L. 93-112, tit. V, § 504 (Sept. 26, 1973), 87 Stat. 394.)

[10] At the time AB 1066 was passed, school districts required explicit authorization to act in many instances. In 1976, the Legislature passed Education Code section 35160, which provides:

> On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

Legislature are presumed to have been aware.[11] Rather than controlling the outcome here, as Respondents claim, the Nursing Practice Act was not even deemed "directly applicable" to the subject of administration of medication in the public schools.

This legislative history provides further support for Appellant's arguments that the provisions of the Nursing Practice Act are meant to govern the circumstances under which a person may hold himself or herself out as a professional nurse, not what can or cannot be done to insure that students with diabetes receive the insulin they need to attend public school. (*See* Appellant's Opening Brief on the Merits ["App. Op. Br."] at 15-26; Appellant's Reply Brief on the Merits at 11-12.) At a minimum, it makes clear that the Nursing Practice Act can and should be harmonized with Education Code section 49423. (*Cal. ARCO Distributors, Inc. v. Atlantic Richfield Co., supra*, 158 Cal.App.3d at 358-359, footnote omitted ["State and federal laws should be accommodated and harmonized where possible so that preemption can be avoided."].)

II.

FAILURE TO HARMONIZE THE NURSING PRACTICE ACT WITH EDUCATION CODE SECTION 49423 WILL CAUSE SERIOUS HARM TO STUDENTS AND SCHOOL DISTRICTS

Respondents fail to acknowledge the harm that will occur to students and school districts if the trial court's decision is upheld. A ruling that interprets section 49423 to mean that only licensed personnel can administer insulin will mean that school districts will have to find licensed

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[11] *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 218.

nurses to administer insulin to students with diabetes whenever they need it during the school day or at school-sponsored activities. As demonstrated below, even if they could afford to pay for such staffing, many districts will be unable to find the licensed staff that they will need. At the outset, however, Respondents' argument that the districts need only provide a "reasonable accommodation" for students with diabetes requires a response.

A. "Reasonable Accommodation" Concepts Do Not Relieve School Districts From Insuring That Students With Diabetes Receive a Free Appropriate Public Education

Respondents argue that "California law and CDE have insured that the mandate of federal disability laws is achieved by providing seven categories of individuals authorized to administer insulin to students so that they can take advantage of their right to a FAPE." (Resp. Br. at 47.) The seven categories to which Respondents refer are taken from the list contained in the Legal Advisory of individuals who are expressly permitted to administer insulin to students pursuant to a Section 504 plan or an Individualized Education Program ("IEP"). (1AA00227.)

The problem is that four of the seven categories fail to comply with the federal requirement that it is the school district that must provide for the administration of insulin, not the student or his or her family. These are: self-administration, which is not enough for students who are not capable of it; administration by a parent/guardian; administration by a parent/guardian designee; and administration during emergencies. That leaves only three options, all of which require licensed

individuals to perform the task.[12] It simply cannot be said that a school district has seven different ways to meet its federal obligation when the majority of those methods are barred by federal law. That is why the Legal Advisory included an eighth category allowing trained unlicensed school personnel to administer insulin with the treating physician's approval.[13]

The case law on which Respondents rely is similarly inapposite. As Appellant points out in its reply brief, most of Respondents' case law deals with reasonable accommodation in a non-public school setting, where the duty to provide a free appropriate public education does

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[12] Those options are a school nurse or physician employed by the school district, an RN or LVN supervised by school medical personnel, or a contracted RN or LVN from a private agency or public health department. (1AA00227.)

[13] Respondents seek to revive their Administrative Procedure Act ("APA") challenge to the Legal Advisory, which they waived by failing to file an answer raising it as an additional issue for review. (Cal. Rule of Court 8.520(b)(3).) Acknowledging that the Court of Appeal declined to reach the issue, Respondents ask this Court either to remand the issue to the Court of Appeal or resolve it pursuant to Rule 8.516(b)(2), which requires that the parties be given notice and an opportunity to brief the issue. Amici urge the Court to apply the well-established rule that if a court finds that an agency has accurately interpreted state law and the issue is a question of law that does not require agency expertise, the court may adopt and enforce that interpretation itself. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576-577; *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 390-393.) At a minimum, because we know of no California case that addresses whether the state APA applies to settlements of federal civil rights suits, the parties and amici should be allowed an opportunity to brief and argue the issue of the applicability of the *Tidewater* rule and the APA itself.

not apply.[14] Two other cases merely held that schools were not required to comply with parents' requests to administer Ritalin in amounts substantially in excess of the recommended dosage. (*Davis v. Francis Howell School Dist.* (8th Cir. 1998) 138 F.3d 754; *DeBord v. Bd. of Education of Ferguson-Florissant School Dist.* (8th Cir. 1997) 126 F.3d 1102.)

Only two other cases are even marginally relevant to the issue before the Court: *R.K. v. Bd. of Education of Scott County*, No. 5:09-344, 2010 WL 5174589 (E.D. Ky. Dec. 15, 2010) and *B.M. v. Bd. of Education of Scott County*, No. 5:07-153, 2008 WL 4073855 (E.D. Ky. Aug. 29, 2008).[15] Both are unpublished decisions, and *R.K.* is currently on appeal to the Sixth Circuit Court of Appeals. (*R.K. v. Bd. of Education of Scott County*, No. 11-5070 (6th Cir., Jan. 13, 2011).) As Appellant has pointed out, *R.K.* and *B.M.* are distinguishable, because in those cases, the school district actually provided insulin administration to insure students with diabetes received a free appropriate public education.

Even if these cases were applicable and the *R.K.* case were to be upheld on appeal, they would not change the outcome here. In both

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[14] *Alexander v. Choate* (1985) 469 U.S. 287 (Medicaid benefits for hospital care); *Southeastern Community College v. Davis* (1979) 442 U.S. 397 (admission to a nursing program); *Cercpac v. Health and Hospitals Corp.* (2d Cir. 1998) 147 F.3d 165 (health care in medical facilities); *Fink v. New York City Dept. of Personnel* (2d Cir. 1995) 53 F.3d 565 (employment); *McDavid v. Arthur* (D.Md. 2006) 437 F.Supp.2d 425 (after school recreation program).

[15] The plaintiff in *B.M.* did not rely on the IDEA, but limited her case to the ADA and Section 504 of the Rehabilitation Act. (2008 WL 4073855, at *6.)

cases, the district court held that a school district could assign a student with diabetes to a school other than his neighborhood school where there was a nurse available to manage the student's diabetes care. That is entirely consistent with the approach taken by the Legal Advisory at issue here, which provides that a trained, unlicensed school employee may administer insulin pursuant to the treating physician's order "[w]hen no expressly authorized person is available . . . ." (1AA00227.) So long as the school district meets its obligation to make an individualized determination that the education available at the other school is appropriate for the child, and so long as the district does not have a blanket policy to educate all children with diabetes in one location, it may assign a student to a school other than his neighborhood school in order to provide him the services he needs.[16] However, although this option may slightly ameliorate the problem for some school districts, it fails even to come close to solving it.

The issue here is what to do when there is no expressly authorized person available. As demonstrated below, that is the case in the vast majority of California's schools, and the situation is not likely to change soon.

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[16] As the Legal Advisory cautions, "[a]n LEA may not have a blanket policy or general practice that insulin or glucagon administration, or other diabetes-related health care services, will *only* be provided by district personnel at one school in the district or will *always* require removal from the classroom in order to receive diabetes related health care services." Instead, the district must always make an individualized determination with respect to the education appropriate for each student. (1AA00217, and citations contained therein, emphasis in original.)

B. Many School Districts Can Neither Find Nor Afford to Hire Enough School Nurses to Comply With Federal Requirements

California has a shortage of nurses, and nowhere is this more apparent than in our public schools. During the 2006-2007 school year, there were 2,804 full-time equivalent school nurses employed statewide, which results in a ratio of only one school nurse for every 2,242 students. (6AA01439-1494.) In 2004, the California Legislature found that only five percent of schools have a full-time school nurse; 69 percent of schools have a part-time school nurse, and 26 percent have no school nurse at all. (AA01399.) Most school nurses are "roaming" nurses, and are assigned to several schools. (*Id.*) Regardless of the number of students requiring daily assistance with diabetes, the shortage unfortunately means that nurses are unlikely to be available to provide services to such students in most school districts.

The shortage of school nurses reflects a broader nursing shortage both in California and across the United States. In September 2010, the Legislature established a Doctor of Nursing Practice degree at the California State University to train nursing educators, recognizing the problems raised by the state's "ever-increasing nursing shortage" and noting that "[a]n estimated state shortage of 47,600 registered nurses is expected by 2010, and by 2020 the shortage is projected to reach 116,600 according to the Governor's California Nurse Education Initiative Annual Report, September 2006." (Ed. Code, § 89280.) The federal government has likewise recognized the severity of the national nursing shortage: The Bureau of Health Professions has predicted that a 12 percent shortfall of registered nurses in 2010 will jump to nearly 30 percent by 2020. (RJN, Exh. D at 2.) The Health Resources and Services

Administration expects an even greater shortage in California, rising from a projected shortage of 21 percent in 2010 to a shortage of 46 percent in 2020. (*Id.*)

At the same time, the incidence of diabetes among California's school children is rising. The federal Center for Disease Control and Prevention states that one in three children born in 2000 is at risk of developing diabetes during his or her lifetime and that children born to women with diabetes are at increased risk for developing diabetes as adolescents or adults. (RJN, Exh. E at 2.) Last July, Dr. Ann Albright, Director of CDC's Division of Diabetes Translation, told Congress, "Diabetes has changed from a public health concern to a widespread epidemic." (*Id.*) She described the difference between Type 1 diabetes, which is an autoimmune disease and accounts for 5 percent of diabetes cases, and Type 2 diabetes, which accounts for 90-95 percent of diabetes cases and is closely linked to obesity and physical inactivity. Until recently, she said, diabetes diagnosed in children and adolescents was almost entirely considered to be Type 1. Now, however, "while still rare, type 2 diabetes in youth is increasingly occurring in those under 20 years of age, particularly minority youth, probably due to obesity in youth." (*Id.*)

Thus, unlike so many other childhood diseases whose prevalence has been slowed or even eliminated, diabetes among children is on the rise, and school districts must find a way to deal with it. The timing could not be worse. Funding for schools in California has reached a crisis point, causing State Superintendent of Public Instruction Torlakson to declare a fiscal emergency on January 6, 2011, launching a department-wide review and urging Californians to come to the aid of schools across the state. (RJN, Exh. F.)

The financial situation for California's schools has been deteriorating for years. In 2008-09, California spent $2,131 less per pupil than the national average, ranking the state 44th in the country. California spent less per pupil than each of the largest 10 states in the nation – almost $6,000 less per pupil than New York. Rhode Island and Vermont each spent *double* what California spent per pupil. When adjusted for the regional cost differences of providing education services (using a national wage index), California spends $2,856 less per pupil than the national average, and ranks 47th in the country.[17]

There is no relief in sight. Even after the Legislature approved $14 billion in cuts, California's Department of Finance estimates the state's budget shortfall for the 2011-2012 fiscal year will be $13.6 billion.[18] If current taxes are extended, funding for California's K-12

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[17] National per-pupil expenditure data is available from the National Education Association's "Rankings of the States 2009 and Estimates of School Statistics." A copy of this publication is available at http://www.nea.org/assets/docs/010rankings.pdf.

[18] RJN, Exh. G at 5. The governor will issue a revised budget on May 16, 2011, at which time these figures will change. For example, the State Controller's Office announced on May 6, 2011 that the state's estimated revenue has exceeded prior estimates by $2.5 billion. (RJN, Exh. H at 2.) Even this increase in the estimated revenue projection, however, will not bridge the sizable gap in the state's budget discussed above.

schools will still be $7.3 billion *less* than it was in 2007-08. (RJN, Exh. G at 6.) If the taxes are not extended, the shortfall will be even greater.[19]

In light of these grim statistics, California's school districts cannot seriously contemplate hiring a huge number of school nurses; they will be lucky to hold on to the ones they have. And if those nurses, who are already stretched too thin, cannot be allowed to train and monitor unlicensed school employees to help administer insulin, they will be unable to deal with the kinds of real emergencies and other situations for which they are needed. Many may leave school nursing, frustrated by the lack of resources and the fact that there are not enough hours in the day to do their jobs.

These are the practical consequences of the trial court's decision. Amici therefore agree with Appellant that the trial court's interpretation of Business and Professions Code section 2725 is preempted, because it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in enacting federal disability rights laws. (App. Op. Br. at 57, quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67.) As demonstrated above, however, there is no need for this Court to reach that issue. Education Code section 49423 and Business and Professions Code section 2725 can and should be harmonized to avoid not

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[19] Contrary to the repeated suggestions in the brief amicus curiae filed by the National Association of School Nurses, et al., CDE and the Superintendent have no control over school funding in California, which is entirely a matter of statute. (Brief Amici Curiae in Support of Parties Challenging Respondent's Argument to Change the California Nurse Practices Action [sic] and Allow UAP's to Administer Insulin to Children in School at 6, 8.)

only the conflict with federal law but a ruling that will place even greater strain on California's struggling school districts.

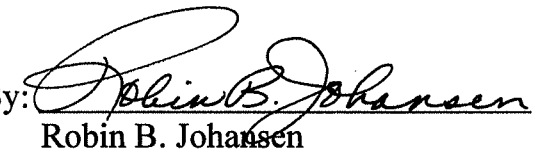
CONCLUSION

The decisions of the trial court and the Court of Appeal should be reversed.

Dated: May 11, 2011

Respectfully submitted,

REMCHO, JOHANSEN & PURCELL, LLP

By: 
Robin B. Johansen

Attorneys for Amici Curiae
State Superintendent of Public Instruction
Tom Torlakson and California Department of Education

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Pursuant to Rule 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has a typeface of 13 points or more and contains 7,287 words as counted by the Microsoft Word 2003 word processing program used to generate the brief.

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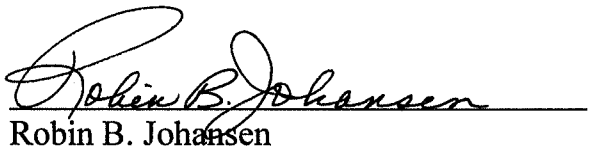

Robin B. Johansen

PROOF OF SERVICE

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

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

On May 11, 2011, I served a true copy of the following document(s):

Application of State Superintendent of Public Instruction Tom Torlakson and California Department of Education to File Brief Amicus Curiae In Support of Appellant American Diabetes Association; Brief Amicus Curiae

on the following party(ies) in said action:

John S. Poulos
Carrie L. Bonnington
Pillsbury Winthrop Shaw Pittman LLP
2600 Capitol Avenue, Suite 300
Sacramento, CA 95816-5930
Phone: (916) 329-4700
Fax: (916) 441-3583

Attorneys for Plaintiffs and Respondents American Nurses Association; American Nurses Association/California; and California School Nurses Organization

Kevin M. Fong
Pillsbury Winthrop Shaw Pittman LLP
50 Fremont Street
P.O. Box 7880
San Francisco, CA 94120-7880
Phone: (415) 983-1000
Fax: (415) 983-1200

Attorneys for Plaintiffs and Respondents American Nurses Association; American Nurses Association/California; and California School Nurses Organization

Alice L. Bodley
Jocelyn Winston
Maureen E. Cones
American Nurses Association
8515 Georgia Avenue, N.W., Suite 400
Silver Spring, MD 20910
Phone: (301) 628-5127
Fax: (301) 628-5345

Attorneys for Plaintiffs and Respondents American Nurses Association; American Nurses Association/California; and California School Nurses Organization

Pamela S. Allen
Linda M. Shipley
California Nurses Association
Legal Department
2000 Franklin Street, Suite 300
Oakland, CA 94612
Phone: (510) 273-2271
Fax: (510) 663-4822

Attorneys for Plaintiff and Respondent California Nurses Association

Ava Chikako Yajima
California Department of Education
1430 "N" Street, Suite 5319
Sacramento, CA 95814
Phone: (916) 319-0860
Fax: (916) 319-0155

Attorneys for Defendant and Respondent California Department of Education

James M. Wood
Dennis Peter Maio
Kenneth J. Philpot
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Phone: (415) 543-8700
Fax: (415) 391-8269

Attorneys for Intervenor and Appellant American Diabetes Association

Arlene Mayerson
Larisa Cummings
Disability Rights Education and Defense Fund, Inc.
3075 Adeline Street, Suite 210
Berkeley, CA 94703
Phone: (510) 644-2555
Fax: (510) 841-8645

Attorneys for Intervenor and Appellant American Diabetes Association

Melanie L. Balestra
Cummins & White, LLP
2424 S.E. Bristol Street, Suite 300
Newport Beach, CA 92660-0764
Phone: (949) 851-1800
Fax: (949) 852-8510

Attorneys for Amici Curiae National Association of School Nurses, et al.

Clerk of the Court
Court of Appeal, Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

Clerk to the
Honorable Lloyd G. Connelly
Sacramento County Superior Court
720 - 9th Street, Department 33
Sacramento, CA 95814

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Michael Narciso

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