No. C061150

In The Court Of Appeal Of The State Of California
Third Appellate District

AMERICAN NURSES ASSOCIATION et al.,
Petitioners and Respondents,

vs.

JACK O'CONNELL et al.,
Respondents and Appellants,

AMERICAN DIABETES ASSOCIATION,
Intervenor and Appellant.

OPENING BRIEF OF APPELLANT AMERICAN DIABETES ASSOCIATION

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

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C061150
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APPELLANT/PETITIONER: AMERICAN DIABETES ASSOCIATION RESPONDENT/REAL PARTY IN INTEREST: AMERICAN NURSES ASS'N ET AL.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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Full name of interested entity or person	Nature of interest (Explain):
(1) American Diabetes Association Research Foundation	Subsidiary of American Diabetes Association
(2) Shaping America's Health	Subsidiary of American Diabetes Association
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 3, 2009

Paul D. Fogel
(TYPE OR PRINT NAME)

▶ [signature]
(SIGNATURE OF PARTY OR ATTORNEY)

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I. INTRODUCTION

Plaintiffs and respondents—various organizations of registered nurses—do not dispute that the thousands of students with diabetes who attend California public schools need insulin to survive and that federal and state anti-discrimination laws require schools to provide students with access to insulin. What they do dispute is *how* schools should provide such access when no registered nurse or other health care professional is available. The answer will determine whether California students with diabetes who cannot self-administer insulin will receive the care the law requires, or whether those students must take their chances with a disease that, when not properly managed, causes life-threatening short-term complications and, over the long term, leads to blindness, kidney failure, heart disease, amputation, and death.

Defendants and appellant California Department of Education ("CDE") and Superintendent of Public Instruction Jack O'Connell ("Superintendent") ("defendants") are responsible for enforcing federal and state disability laws in the public schools. In 2007, defendants settled a federal lawsuit that appellant and intervenor American Diabetes Association ("ADA") and several students with diabetes had filed, in which they claimed that school districts were violating federal law by failing to give students with diabetes health-related services. Following the settlement, CDE issued a "Legal Advisory" reminding school districts of their federal obligation to

provide eligible students with diabetes a free appropriate public education.

A key provision of the Advisory states that, when licensed health care professionals are unavailable, school employees who are not health care professionals but are adequately trained ("unlicensed school personnel") may administer insulin to students pursuant to the student's physician's orders and with the student's parent's or guardian's consent. This clarification of state law was essential because only a small percentage of California schools employ a full-time registered nurse—a situation that is unlikely to change in the near future. Moreover, in the rare case where a registered nurse is assigned fulltime to a school, one nurse is insufficient, as students with diabetes need insulin multiple, and sometimes unpredictable, times a day including during field trips and extracurricular activities. Thus, unlicensed school personnel must be authorized to administer insulin to protect those students with diabetes who are unable to self-administer.

Unfortunately, the federal settlement only led to more litigation. Barely two months after it was finalized, respondents filed this action, claiming state law rendered invalid that portion of the Legal Advisory stating that unlicensed school personnel may administer insulin to students with diabetes. Specifically, respondents claimed that the Advisory (1) conflicts with Business and Professions Code section 2725 ("section 2725"), which prohibits the unlicensed practice of registered nursing, (2) is not supported by Education Code section

49423 ("section 49423"), which permits both school nurses and unlicensed school personnel to "assist" pupils with medication, and (3) is invalid as a regulation that CDE failed to adopt in compliance with the Administrative Procedure Act ("APA").

Both defendants and ADA ("appellants"), however, showed that non-health care professionals can administer insulin safely and that unlicensed persons—family members, friends, and even babysitters—administer it to children every day outside of school. Indeed, state law recognizes this reality by providing that persons who do not possess a registered nursing or other health care profession license may administer insulin to children. *See* Health & Saf. Code § 1507.25(b). Accordingly, unlicensed school personnel should be authorized to administer insulin to students at school.

ADA also showed that some school districts were not meeting federal requirements. Sometimes, parents were forced to leave their jobs and go to school to administer insulin to their children. In other cases, physicians were forced to use outdated diabetes regimes that are not as effective in preventing the complications of diabetes. In still other situations, children did not receive insulin when they needed it and became ill at school.

Although the trial court found appellants' position the better one as a matter of policy, it nonetheless endorsed respondents' position on the law. It thus entered judgment in their favor and issued a writ barring the Advisory's enforcement to the extent it authorizes

unlicensed school personnel to administer insulin to students with diabetes. This was error.

First, the trial court read section 49423 too narrowly, stating it authorizes unlicensed school personnel only to help students with diabetes *self-administer* insulin rather than also to *administer* it. But read in the context of its language, purpose, and legislative history, section 49423 authorizes *administering* insulin as well as helping with self-administration. Likewise, the court construed section 2725 too broadly, concluding that it permits only registered nurses to administer insulin. Yet, section 2725 does not apply to tasks—like administering insulin—that do not require a substantial amount of scientific knowledge or technical skill. In any event, that statute does not apply to individuals—such as unlicensed school personnel—who do not purport to practice as registered nurses. The court also failed to construe these two statutes in harmony so as to avoid frustrating the federal guarantee of a free appropriate public education to students with diabetes. Finally, the court failed to recognize that the Advisory is not an APA "regulation" and in any case is not subject to the APA's procedural requirements.

The trial court's rulings do not support its conclusion that the Legal Advisory is invalid. Accordingly, this Court should reverse the judgment and direct the trial court to enter judgment for appellants.

II. STATEMENT OF APPEALABILITY (Cal. R. Ct. 8.204(a)(3)(B))

This appeal is from a final judgment that fully disposes of all issues between the parties.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Significant Problem Of Childhood Diabetes, The Need For Insulin Administration At School, And The Federal Right To A Free Appropriate Public Education For Students With Diabetes

Diabetes is a chronic disease that prevents the body from properly using insulin to convert glucose, a sugar, from food into energy. (3 Appellant's Appendix ("AA") 713; 6AA/1415) There are two types of diabetes. (*Id.*) Type 1 diabetes is an autoimmune disorder that leaves the body unable to produce insulin. (*Id.*) Individuals with type 1 diabetes must accordingly take multiple doses of insulin daily to survive and maintain appropriate blood glucose levels. (*Id.*) About 1 in every 400 to 500 children has type 1 diabetes. (6AA/1410) Type 2 diabetes results when the body does not produce enough insulin and/or the body's cells become resistant to insulin's effects. (3AA/713; 6AA/1417) While some people with type 2 diabetes are able to control the disease with proper diet and exercise, many others need to take oral medication, insulin, or both, to do so. (*Id.*)

Diabetes is managed on an individual basis. (3AA/714-15) The goal in treating children with diabetes is to control blood glucose levels by keeping them within a target range that is determined for each child by his or her physician. (*Id.*; 6AA/1424) Low blood glucose levels, or hypoglycemia, can result from too much insulin, too little food, or increased exercise, and can impair cognitive abilities and cause irritability, shakiness, and confusion. (3AA/716-17; 6AA/1426) If not treated promptly, hypoglycemia can cause unconsciousness, seizures, and convulsions, and is life-threatening. (3AA/717; 6AA/1426) High blood glucose levels, or hyperglycemia, can result from too little insulin, too much food, or decreased exercise, and may also impair cognitive abilities, as well as cause increased thirst, frequent urination, nausea, blurry vision, and fatigue. (3AA/717; 6AA/1428) Untreated hyperglycemia can cause a life-threatening condition called diabetic ketoacidosis ("DKA"), characterized by labored breathing, weakness, confusion, and possibly unconsciousness. (3AA/717-18; 6AA/1429) Normally DKA will not occur if blood glucose levels are regularly monitored and milder forms of hyperglycemia are treated. (3AA/717-18) Over time, hyperglycemia leads to serious complications, including heart disease, blindness, kidney failure, and amputation. (6AA/1428) Accordingly, diabetes must be managed 24 hours a day, 7 days a week. (6AA/1418)

Proper diabetes management for children generally requires regular monitoring of blood glucose levels and administration of insulin multiple times each day, including during school hours, to

maintain the child's targeted blood glucose level. (6AA/1424) Blood glucose levels are monitored by pricking the skin with a lancet, placing a drop of blood a test strip, and inserting the strip into a blood glucose meter. (*Id.*)

Insulin is generally administered with (1) a syringe, (2) a pen that holds a standardized cartridge of insulin, or (3) an insulin pump. (6AA/1430) When insulin is administered through a syringe or an insulin pen, a subcutaneous injection is given just under the skin. (3AA/714) In routine diabetes care, insulin does not need to be administered through intramuscular or intravenous injection. (*Id.*) An insulin pump is a pager-size computerized device continuously attached to the skin and generally worn on a belt or waistband. (6AA/1431) It delivers small, steady insulin doses throughout the day and calculates and provides additional insulin doses to cover food consumption when the number of carbohydrates the child intends to consume is entered. (*Id.*)

Older students often manage most of their diabetes tasks themselves, and accordingly self-administer insulin as necessary throughout the school day using one of these methods. (6AA/1418) If students are too young or otherwise incapable of safely managing their diabetes themselves, they require school personnel to administer insulin to them. (*Id.*)

Insulin is often needed at set times each school day, typically just before or after lunch as well as at other times when a student eats.

(3AA/719) Failing to time the dose of insulin correctly with food increases the risk of both hypoglycemia and hyperglycemia, placing the student in immediate danger, making learning more difficult, and increasing the likelihood of long-term complications. (*Id.*) In addition, students need additional insulin in response to too-high blood glucose levels, which can occur at any time during the day. (6AA/1428-29) Accordingly, to be safe, healthy, and able to learn at his or her full potential, the student requires someone who can administer insulin at school, on field trips, and during extracurricular activities, as quickly as possible. (3AA/718-19)

The amount of an insulin dose is determined on the basis of the student's blood glucose level and/or intended carbohydrate intake, according to detailed instructions from the student's physician in a detailed diabetes care plan. (6AA/1418, 1486-89) The job of the school personnel who administers insulin, whether or not a registered nurse, is simply to make a basic calculation following these instructions, not to modify them based on any subjective factors. (6AA/1418, 1488)

Unlicensed personnel—including school personnel—have routinely been trained to administer insulin safely. (4AA/844; 6AA/1647-52, 1667-68) Indeed, experts who care for people with diabetes believe that, in the absence of a registered nurse, unlicensed school personnel can and should administer insulin to students with diabetes. (*Id.*) Numerous groups—including the American Academy of Pediatrics, American Association of Clinical Endocrinologists,

Pediatric Endocrine Nursing Society, American Association of Diabetes Educators, and Juvenile Diabetes Research Foundation—have signed a statement of principles that take the same position. (6AA/1652) Broad-based medical organizations, including the American Academy of Pediatrics and the American Medical Association also support having unlicensed school personnel administer insulin, as do the National Institutes of Health, Centers for Disease Control, and the United States Department of Education. (4AA/817-902, 908-12)[1]

B. Childhood Diabetes And The Registered Nursing Shortage In Public Schools—A Problem That Has Deprived Students With Diabetes Of Their Federal Right To A Free Appropriate Public Education

In 2003, the Legislature estimated there were 15,000 students with diabetes in California's public schools. (6AA/1397) At the same time, the Legislature acknowledged that there was a "severe [registered] nursing shortage in California, especially in K-12 schools," with the result that, "[a]ccording to the California School

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[1] The American Medical Association's Council on Science and Public Health has stated: "The ideal situation is for a school nurse to provide diabetes care-related health services. However, even if a full-time nurse is present (and many schools lack sufficient nursing staff), additional personnel must be trained to provide routine and emergency diabetes care, including ... administering ... insulin, if needed, during the school day and during extracurricular activities and field trips when a nurse is unavailable." (4AA/909)

Nurses Organization, there [were then] only 2,695 credentialed school nurses who serve more than six million children in the California public school system." (6AA/1399) Only 5 percent of California schools employed a full-time registered nurse, 69 percent employed a part-time registered nurse, and 26 percent had no registered nurse at all, as most school nurses were merely "roaming" nurses and not full-time at any one school. (*Id.*)

During the 2006-07 school year, there were some 6.3 million K-12 students enrolled in almost 1,400 school districts and nearly 10,000 public schools across the state. (6AA/1493) During that same year, however, only 2,800 full-time equivalent school nurses were working in public schools, or one school nurse for about every 2,200 students (nearly one-fourth the recommended federal ratio of 1 per every 750 students), or 1 school nurse per every 3.5 schools. (6AA/1494, 1496-1500)

Placing a registered nurse in every school will not be possible in the near future. (6AA/1505) A 2007 forecast of the statewide registered nurse workforce conducted for the Board of Registered Nursing ("BRN") found that California faces a significant nursing shortage—between 10,294 and 59,027 full-time equivalent registered nurses, depending on whether the demand forecast is based on current labor market conditions or the national average number of full-time equivalent registered nurses per 100,000 population. (*Id.*) Either way, there are not—and will not be—enough registered nurses in the state to meet the needs of students with diabetes for insulin

administration. (*Id.*) This is especially true now in light of the " 'unprecedented fiscal crisis' " now gripping California generally and public schools in particular. *See* California Department of Education, Budget Crisis Report Card, *available at* http://www.cde.ca.gov/nr/re/-ht/bcrc.asp (as of Oct. 27, 2009).

As a result of this chronic shortage, if school nurses are the only school personnel authorized to administer insulin to students with diabetes, substantial numbers of such students will not receive insulin from school personnel. (6AA/1505) While some school districts have required a parent or guardian to assume the burden of providing insulin administration, such a requirement is inadequate and impractical. (3AA/624-27, 638-41, 674-78, 793-96; 5AA/1194-96, 1203-05, 1244, 1293)

C. The *K.C.* Litigation And The Settlement: The CDE Issues A Legal Advisory Stating That Unlicensed School Personnel May Administer Insulin To Students With Diabetes When Needed To Effectuate Their Federal Right To A Free Appropriate Public Education

In October 2005, ADA and several K-12 students with diabetes, on behalf of all those students and all similarly situated students, filed a federal lawsuit against the CDE and the Superintendent, among other defendants. *K.C. et al. v. O'Connell et al.*, No. C05-4077 MMC (N.D. Cal.) (*K.C.*). (2AA/401-65) The lawsuit charged the defendants with violating Section 504 of the Rehabilitation Act of 1973 ("Section 504") [29 U.S.C. § 794], Title II of the Americans

with Disabilities Act ("Americans with Disabilities Act") [42 U.S.C. § 12101 et seq.], and the Individuals with Disabilities Education Act ("IDEA") [20 U.S.C. § 1400 et seq.], by failing to provide students with diabetes with health care services, including insulin administration, necessary to effectuate their right to a free appropriate public education, in accordance with their Section 504 Plan (under Section 504) or Individualized Education Program or "IEP" (under the IDEA). (2AA/401-65)

After extensive negotiations and multiple mediations, the parties reached a settlement in July 2007. (1AA/171-227) The settlement required the CDE to issue and post on its website a "Legal Advisory," clarifying for school districts the rights of students with diabetes under federal and state anti-discrimination law, to ensure that those students receive federally-mandated services. (1AA/172-74) The Advisory explains these rights, including the right of students with diabetes to receive health care services, including the administration of insulin when needed during the school day and at school-related activities. (5AA/1097-1109)

Because some school districts were uncertain as to who was authorized to administer insulin to students with diabetes, the Legal Advisory first lists the seven categories of persons expressly authorized by state law:

1. [S]elf administration, with authorization of the student's licensed health care provide[r] and parent/guardian;

2. [S]chool nurse or school physician employed by the LEA [i.e., Local Educational Agency];

3. [A]ppropriately licensed school employee (*i.e.*, a registered nurse or a licensed vocational nurse) who is supervised by a school physician, school nurse, or other appropriate individual;

4. [C]ontracted registered nurse or licensed vocational nurse from a private agency or registry, or by contract with a public health nurse employed by the local county health department;

5. [P]arent/guardian who so elect[s];

6. [P]arent/guardian designee, if parent/guardian so elects, who shall be a volunteer who is not an employee of the LEA; and

7. [U]nlicensed voluntary school employee with appropriate training, but only in emergencies as defined by Section 2727(d) of the Business and Professions Code (epidemics or public disasters).

(5AA/1109)

The Legal Advisory also acknowledges, however, that situations may arise when no person in one of the seven listed categories is available to administer insulin. The Advisory states:

> When no expressly authorized person is available under categories 2-4, *supra*, federal law—the Section 504 Plan or the IEP—must still be honored and implemented. Thus, a category #8 is available under federal law:
>
> 8. Voluntary school employee who is unlicensed but who has been adequately trained to administer insulin pursuant to the student's treating physician's written orders as required by the Section 504 Plan or the IEP.

(*Id.*)

D. Several Registered Nursing Organizations Sue The CDE And The Superintendent, Seeking To Invalidate A Portion Of The Legal Advisory, And ADA Intervenes

In October 2007, or about three months after the settlement, the American Nurses Association and the American Nurses Association/California—both organizations of registered nurses and neither of which sought to participate in the *K.C.* litigation—sued the CDE and the Superintendent for declaratory and injunctive relief in the Sacramento County Superior Court. (1AA/1-23) The complaint challenged the Legal Advisory insofar as it states that when no school nurse or other appropriately licensed person is available to administer insulin to a student with diabetes, voluntary unlicensed but trained

school personnel may do so pursuant to the orders of the student's physician as required by the student's Section 504 Plan or IEP. (*Id.*)

In February 2008, one month after granting ADA's motion to intervene, the trial court granted respondents leave to file a petition for a writ of mandate and to add as the California School Nurses Organization, another registered nurses organization, as a plaintiff. (1AA/57, 61) The California Nurses Association, yet another registered nursing organization, later joined as a plaintiff. (1AA/61, 83)

E. Although Agreeing That As A Matter Of Policy, Unlicensed School Personnel Should Be Authorized To Administer Insulin To Students With Diabetes, The Trial Court Invalidates The Challenged Portion Of The Legal Advisory

The parties proceeded to briefing (which included the submission of documentary evidence through declarations) and a hearing.

In their papers, respondents argued: (1) the Legal Advisory is invalid on the ground that it conflicts with section 2725, which purportedly prohibits persons other than registered nurses from administering medications, and finds no support in section 49423, which authorizes unlicensed school personnel only to "assist" with but not "administer" medication; (2) the Advisory is invalid on the ground that it constitutes an APA "regulation" but was not adopted in compliance with the APA's procedural requirements; (3) in issuing

the Advisory, (a) the CDE violated section 3.5 of article III of the California Constitution because it purportedly "declare[d]" section 2725 "unenforceable" and "refuse[d] to enforce" it in advance of any determination" by an appellate court that it was "unconstitutional"; and (b) the CDE and the Superintendent violated Education Code section 33031 and Government Code section 11152, respectively, because the Advisory is purportedly inconsistent with section 2725. (1AA/152-69; 7AA/1688-1705)

Appellants countered, however, by showing: (1) properly construed so as to avoid frustrating federal guarantees, section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes and section 2725 does not prohibit them from doing so; (2) the Legal Advisory is not an APA "regulation" and in any event was not subject to the APA's procedural requirements; (3) the CDE did not violate the Constitution (because it did not purport to declare section 2725 unenforceable or to refuse to enforce it), nor did the CDE or the Superintendent violate the Education or Government Code (because the Advisory is not inconsistent with section 2725). (3AA/600-19; 5AA/1356-78; 7AA/1718-30)

At the November 2008 hearing, the trial court and respondents acknowledged that federal law grants students with diabetes the right to insulin administration that is necessary to effectuate their right to a free appropriate public education. (Reporter's Transcript ("RT") 19, 21, 24) Respondents urged, however, that the *K.C.* plaintiffs had sought the "wrong relief in federal court"—"[t]hey should have

sought to have the State of California fund what is required under state law and that is licensed personnel to administer insulin to these students." (RT/25) ADA responded that *K.C.* was not a lawsuit about "funding" but about ensuring that students with diabetes "get[ ] the insulin" that their physicians prescribed, by train[ing] someone appropriately" to administer it. (RT/26-27)

The trial judge was persuaded by appellants' policy position, noting that "this argument is a very persuasive public policy argument." (RT/27) But, he said, "I'm a Judge, I am trying to translate that to the law in terms of what I can do to enforce the law. And so ... if I was in the Legislature you got my vote, but that doesn't ... answer what to do within the scope of the law as it exists." (*Id.*) Later, addressing respondents' counsel, the court stated: "I will just tell you right now, I think your [*sic*] dead wrong on the policy. ... If that bill was before me, I'd sign it. It would be law because it makes sense to me." (RT/33). Nonetheless, the court was not persuaded by appellants' statutory arguments. (RT/27-31, 35-39, 46-48) Thus, in the end, although the court found the "weight of the evidence" supports appellants' "policy position," it concluded the law favored respondents. (RT/55)

The trial court stated its reasoning thus: Under section 2725, only registered nurses may administer medications (including insulin); under that provision, persons who are not registered nurses may administer insulin only if they are expressly authorized to do so; section 49423 does not authorize unlicensed school personnel to

administer insulin to students with diabetes because the statute authorizes them only to "assist" with but not "administer" medication; and section 2725 does not frustrate the federal guarantee of a free appropriate public education to students with diabetes and hence is not preempted by federal law. (RT/56-60; 8AA/2019-20)

In the ensuing judgment, the trial court declared the Legal Advisory invalid to the extent that it states that unlicensed school personnel may administer insulin to students with diabetes where necessary to comply with federal law. (8AA/2021) The court also directed issuance of a peremptory writ of mandate ordering defendants to refrain from implementing or enforcing the invalid portion of the Advisory and to delete that portion from the remainder. (*Id.*)

F. The CDE And The Superintendent Appeal, As Does ADA, And This Court Confirms That The Appeal Has Automatically Stayed The Trial Court's Judgment

Appellants timely appealed from the judgment. (8AA/2036-51, 2069-72) Because the trial court's peremptory writ of mandate was in the nature of a mandatory injunction, which is automatically stayed on appeal [*see Byington v. Super. Ct.*, 14 Cal.2d 68, 70 (1939)], ADA successfully moved this Court to confirm the automatic stay. (3/17/09 & 4/2/09 Dock. Entries) Respondents then moved for calendar preference. (4/10/09 Dock. Entry) This Court then ordered that the appeal would be "accorded priority pursuant to statutory provisions" but denied the motion "[i]n all other respects." (4/24/09 Dock. Entry)

IV. THE JUDGMENT IS UNSUPPORTED AS A MATTER OF LAW

The trial court's judgment rests on two conclusions: (1) to the extent it states that unlicensed school personnel are authorized to administer insulin to students with diabetes where necessary to comply with federal law without express state law authorization, the Legal Advisory conflicts with section 2725 and is not supported by section 49423, and is therefore invalid [RT/55-60; 8AA/2019-20]; and (2) the Advisory constitutes an APA "regulation" not adopted in compliance with the APA's procedural requirements, and is therefore invalid [8AA/2021]. As we show below, neither conclusion passes muster.

A. The Trial Court Erred In Concluding That, Notwithstanding Section 49423, The Legal Advisory Is Invalid As Conflicting With Section 2725

1. Standard Of Review And Rules Of Statutory Construction

This Court reviews de novo the trial court's conclusion that the Legal Advisory conflicts with section 2725 and is not supported by section 49423. *See 20th Century Ins. Co. v. Garamendi*, 8 Cal.4th 216, 271-72 (1994) (whether agency action is "consistent ... with the law" is "examined independently"). This is because the trial court's conclusion rests on statutory interpretation, which is examined de novo. *See Smith v. Rae-Venter Law Group*, 29 Cal.4th 345, 357 (2002) (interpretation of statute is "through independent review").

In construing any statute, a court undertakes a single "fundamental task" [*Smith v. Super. Ct.*, 39 Cal.4th 77, 83 (2006)]—to "ascertain and declare" what the statute contains, "not ... insert[ing] what has been omitted, or ... omit[ting] what has been inserted" [*Manufacturers Life Ins. Co. v. Super. Ct.*, 10 Cal.4th 257, 274 (1995)]. In doing so, the court "begin[s] with the language of the statute, giving the words their usual and ordinary meaning." *Smith*, 39 Cal.4th at 83. The court reads the statute's language "in the context of the statute as a whole and the overall statutory scheme," giving "significance to every word, phrase, sentence, and part of [the] act in pursuance of the legislative purpose." *Id.* In so doing, the court "harmonize[s] the various parts of [the] enactment ... in the context of the statutory framework as a whole." *Cummins, Inc. v. Super. Ct.*, 36 Cal.4th 478, 487 (2005). All things being equal, the court gives the same reading to the same word wherever it encounters it. *E.g.*, *Miranda v. National Emergency Services, Inc.*, 35 Cal.App.4th 894, 905 (1995) (words or phrases given "a particular meaning in one part or portion of a law, should be accorded the same meaning in other parts or portions of the law").

If the statute is clear, the court reads it as written and its "inquiry ends." *Van Horn v. Watson*, 45 Cal. 4th 322, 326 (2008). But if the statute is ambiguous, the court may turn to legislative history. *Smith*, 39 Cal.4th at 83. In that situation, the court avoids any interpretation that would produce absurd consequences. *Santa Clara Co. Local Transp. Auth. v. Guardino*, 11 Cal.4th 220, 235 (1995). The court also considers whether a particular interpretation

would raise "serious constitutional questions," and if so, it avoids that interpretation. *Carlos v. Super. Ct.*, 35 Cal.3d 131, 147 (1983), *overruled on another ground by People v. Anderson*, 43 Cal.3d 1104, 1115 (1987). That is because the court construes a "statute ... whenever possible so as to preserve its constitutionality." *Dyna-Med, Inc. v. Fair Emp't & Housing Com.*, 43 Cal.3d 1379, 1387 (1987).

Finally, when statutory interpretation involves multiple statutes that "touch upon a common subject," the court "construe[s] them with reference to each other and seek[s] to harmonize them in such a way that [none] becomes surplusage." *Lincoln Place Tenants Assn. v. City of Los Angeles*, 155 Cal.App.4th 425, 440 (2007).

2. The Trial Court's Conclusion Fails Independent Review

The Legal Advisory states that when no school nurse or other appropriately licensed person is available to administer insulin to a student with diabetes, an unlicensed but trained voluntary school employee may do so as required by the student's Section 504 Plan or IEP. (5AA/1109) Whether the Advisory conflicts with section 2725 depends on the meaning of section 49423—the issue we discuss below.

a. The Federal Background To Section 49423 And Section 2725

Federal law provides context for understanding the two state statutes at issue here.

The Americans with Disabilities Act and Section 504, with their implementing regulations, protect students from discrimination based on their disabilities. These statutes prohibit California public schools from excluding students with disabilities from participation in, denying them the benefits of, or subjecting them to discrimination in, any program or activity. 29 U.S.C. § 794; 42 U.S.C. § 12132; 34 C.F.R. § 104.4. More specifically, they grant students with disabilities the right to receive a free appropriate public education. *Id.* (implementing § 504). They have also been made effective in California through Government Code section 11135, which incorporates and implements them.

These statutes grant students with diabetes who qualify as disabled a right to receive the "related aids and services" they require for access to education. 34 C.F.R. § 104.33(b)(1). These services are usually documented in a "Section 504 Plan." *See id.* § 104.31 et seq. Consequently, these statutes require defendants to provide necessary individualized health care, including insulin administration, to students with diabetes and to ensure that school districts comply with the law. 42 U.S.C. § 12132; 28 C.F.R. § 35.101 et seq.; Gov't Code § 11135 et seq. Indeed, the Superintendent is "responsible for

providing leadership ... to ensure that the requirements of ... nondiscrimination laws [like § 504 and the Americans with Disabilities Act] and their related regulations are met in educational programs ...." 5 Cal. Code Regs. § 4902.

Alongside the Americans with Disabilities Act and Section 504, the IDEA supports states in providing special education and related services to children with disabilities. 20 U.S.C. § 1400 et seq. Its primary purpose is "to ensure 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 further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Under the IDEA, school districts must develop an "Individualized Education Program" (or IEP) for eligible students. 34 C.F.R. § 300.112. An IEP sets forth both the "special education and related services and supplementary aids and services" and the "program modifications or supports for school personnel" that the student needs to receive a free appropriate public education. 20 U.S.C. § 1414(d)(1)(A)(i)(IV); *see* 34 C.F.R. §§ 300.320-300.328.

The IDEA's regulations recognize that qualified school personnel other than school nurses are necessary to achieve its purpose, because "most schools do not have a qualified school nurse on a full-time basis ..., and ... many schools rely on other qualified school personnel to provide school health services under the direction

of a school nurse." 71 Fed. Reg. 46540, 46574 (Aug. 14, 2006); *see* 34 C.F.R. § 300.34(a) & (c)(13).

As incorporated and implemented through Education Code section 56363(b)(12), the IDEA requires persons and entities subject to it to provide health and nursing services to eligible students when necessary. Accordingly, the IDEA requires the CDE to implement and monitor school districts' provision of health and nursing services. *See, e.g.*, 34 C.F.R. §§ 300.149-300.150, 300.600-300.602, 300.606-300.608; Ed. Code § 56135; Gov't Code § 11135 et seq.; 5 Cal. Code Regs. § 4902. Accordingly, "[a]ny pupil who is required to have specialized physical health care services during the school day, prescribed for him or her by a licensed physician and surgeon, may be assisted by a qualified nurse, qualified public health nurse, *or other qualified school personnel*, if the school district receives" a written statement detailing the procedure from the pupil's physician along with a written statement from the pupil's parent or guardian granting consent for the provision of these services. *Id.* § 3051.12(b)(3)(E)(1) (ital. added). And " '[q]ualified' for the designated school personnel" means "trained in the procedures to a level of competence and safety which meets the objectives of the training as provided by the school nurse, public health nurse, licensed physician and surgeon, or other programs which provide the training," along with competence in certain emergency procedures and "skill in the use of equipment and performance of techniques necessary to provide specialized physical health care services for individuals with exceptional needs." *Id.* § 3051.12(b)(1)(C).

In sum, operating together, these federal statutes grant students with diabetes a right to a free appropriate public education, which includes a right to have insulin administered in a way that makes such an education a reality. As noted, students are less able to concentrate and learn, and are medically at risk, when their blood glucose levels are not in the target range while at school. A student who risks health complications because he or she cannot receive insulin at school is denied meaningful access to an education. Respondents did not dispute below that federal law requires the school to provide insulin administration when a student's physician orders it pursuant to a Section 504 Plan or IEP. Correspondingly, these statutes require defendants and school districts to provide students with diabetes a free appropriate public education and, to that end, provide for insulin administration.

b. Section 49423

Section 49423 provides in pertinent part that "any pupil who is required to take, during the regular schoolday, medication prescribed for him or her by a physician or surgeon may be assisted by the school nurse or other designated school personnel," so long as (1) the pupil's "physician" provides a "written statement" that details the name of the medication, method, amount, and schedule by which the pupil must take the medication, and (2) the pupil's "parent, foster parent, or guardian" provides a "written statement ... indicating the desire that the school district assist the pupil in the matters set forth in the statement of the physician." § 49423(a), (b)(1). In this manner,

section 49423 grants every student a right to receive assistance from the school nurse or other school personnel with medication he or she must take during the schoolday.

Section 49423 is implemented by regulations that the CDE adopted under the authority of Education Code section 49423.6 ("section 49423.6"). *See* 5 Cal. Code Regs. § 600 et seq. Section 49423.6 required the CDE to "adopt regulations"—which it did—"regarding the administration of medication in the public schools pursuant to Section 49423" to "address[ ] a situation where a pupil's parent or legal guardian has initiated a request to have a local educational agency dispense medicine to a pupil."

A close examination of section 49423 within this context shows that a student's right to "assistance" with medication includes "administration."

First, and obviously, section 49423 authorizes the school nurse and other school personnel to assist students with "medication" [§ 49423(a)], which includes both prescription and non-prescription "substances." 5 Cal. Code Regs. § 601(b). Insulin, of course, is included.

Second, section 49423 authorizes both *unlicensed* school personnel and *licensed* school personnel to assist pupils with medication. § 49423(a). A "school nurse" is, by definition, a "licensed registered nurse." 5 Cal. Code Regs. § 601(h). The "other

... school personnel" referenced in the statute, however, need not possess any license. To be sure, if such personnel happen to be "licensed health care professionals," they must provide assistance "in keeping with applicable standards of professional practice for their license." *Id.* § 604(b). But that condition implies that such personnel *need not* be licensed. Had the Legislature intended section 49423 to require such personnel to be licensed, it presumably would have said so. It didn't.[2]

Third, and most significantly, section 49423 authorizes unlicensed school personnel to "assist" students with medication

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[2] Section 604(b) of title 5 of the California Code of Regulations, which implements section 49423, states that unlicensed school personnel "may administer medication to pupils or otherwise assist pupils in the administration of medication *as allowed by law*[.]" 5 Cal. Code Regs. § 604(b) (ital. added); *see id.* § 601(e)(2) (defining such personnel to include persons who, among other things, "[m]ay *legally* administer the medication to the pupil or otherwise assist the pupil in the administration of the medication" (ital. added)).

By so stating, section 604(b) does not require that *unlicensed* school personnel must nevertheless be *licensed* to assist students with medication, only that they must do so "as allowed by law." *See* Ed. Code § 49414.5(b)(1) (unlicensed school personnel may assist students with diabetes with glucagon in certain circumstances and in accordance with certain standards). In any event, if section 604(b) purported to require *unlicensed* school personnel to be *licensed* to assist students with medication, it would be invalid as conflicting with section 49423, which contains no such requirement. *See, e.g., California Assn. of Psychology Providers v. Rank*, 51 Cal.3d 1, 11 (1990) (" 'Administrative regulations that alter or amend the statute or enlarge or impair its scope are void[.]' ").

without specifying how. But "assist"—the statute's operative word—is broad enough to embrace both "administer" and "help in self-administration." After all, "assist" means "aid" or "help." Oxford English Dict. (2d ed. 1989), *available at* http://dictionary.oed.com (as of Oct. 21, 2009).

It is noteworthy that section 49423 authorizes both school nurses and unlicensed school personnel to "assist" with medication. Even respondents have not denied that "assist" is broad enough to authorize school nurses to *administer* medication. If the Legislature intended to give "assist" a narrower compass when applied to unlicensed school personnel and to authorize them only to *help* with self-administration, presumably it would have stated that such personnel may only "assist" while school nurses may both "assist" and "administer." But the Legislature did not make that distinction.

Nor can the Legislature reasonably be understood to have harbored such an intent to make that distinction. After all, a word given "a particular meaning in one part or portion of a law[ ] should be accorded the same meaning in other parts or portions of the law." *Miranda*, 35 Cal.App.4th at 905. A fortiori, a word given a particular meaning in one *portion* of a law should *not* be given different meanings *in that same portion.* Since "assist" authorizes administration of medication by a school nurse, it must also authorize administration of medication by unlicensed school personnel.

The regulations implementing section 49423 support this conclusion. For example, under one regulation, both a "school nurse" and "other ... school personnel" "may *administer medication* to a pupil or *otherwise assist* a pupil *in the administration of medication*[.]" 5 Cal. Code Reg. § 604(a), (b) (ital. added). A dozen additional regulations contain language similar or identical to that italicized above, referring to "administering medication to a pupil or otherwise assisting a pupil in the administration of medication." *See* 5 Cal. Code Reg. §§ 600(b), 601(c), 601(d)(4), 601(e), 603(a)(3), 603(a)(4), 603(a)(5), 604(c), 604(d), 607, 610(b), 611.

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

That "assistance" in section 49423 includes "administration" is supported by two other Education Code statutes—section 49423.5 and section 49423.6. As noted, section 49423.6 required the CDE to adopt regulations "regarding the *administration* of medication in the public schools pursuant to Section 49423." (Ital. added) The statute did not restrict the CDE's regulation-adopting power to help with *self-administration.* Thus, because section 49423 refers only to "assisting" students with medication but section 49423.6 required the

CDE to adopt regulations regarding its "administration," the Legislature must have intended "assistance" in section 49423 to include "administration."

For its part, section 49423.5 provides that any individual with exceptional needs who requires "specialized physical health care services," such as "catheterization," "gastric tube feeding," and "suctioning," during the regular schoolday, may be "assisted" by unlicensed school personnel. § 49423.5(a), (d). "Assistance" with services of this sort must include "administration," since unlicensed school personnel renders such "services" with little or no participation by the recipient.[3]

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[3] In a 2006 document entitled "Medication Administration Assistance in California" ("Medication Administration Assistance"), the CDE stated that the "terms 'assist' and 'administer' are plainly not synonymous." (7AA/1709-10) That statement is correct as far as it goes, but incorrect to the extent it implies that "assist" and "administer" are mutually exclusive. Given the regulations—which the document does not acknowledge—"assist" and "administer" are not mutually exclusive, since the former includes the latter. In addition, the CDE stated that notwithstanding section 49423, "there is no clear statutory authority in California permitting" unlicensed school personnel "to 'administer' insulin[.]" (7AA/1709) That statement was based on the premise that the statute permits such personnel only to "assist" with but not to "administer" insulin, and that "assist" and "administer" are mutually exclusive. But as shown, that premise is unsound.

Even if section 49423 were ambiguous, this Court would have to resolve the ambiguity in favor of the construction authorizing unlicensed school personnel to administer insulin to students with diabetes in light of the provision's legislative history.

For example, from the time of section 49423's enactment in 1976 [Stats. 1975, ch. 1010, § 2]—and indeed from the enactment of its predecessor in 1968 [Stats. 1968, ch. 681, § 1, adding former Ed. Code § 11753.1]—the statute has covered *both* licensed *and* unlicensed school personnel. The legislative materials accompanying the most recent amendment of section 49423 in 2004 reflect that coverage. Sen. Com. on Health and Human Services, Analysis of Sen. Bill No. 1912 (2003-2004 Reg. Sess.) as amended May 3, 2004, at 3-4 (because "[p]ublic schools lack the funding to employ school nurses or other licensed health professionals," "some schools assign other school staff with healthcare duties that are secondary to their primary responsibilities").

It is also clear from the legislative history of what would have become Education Code section 49423.1 that section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes.

In 2002, the Legislature passed Assembly Bill No. 481 (2001-02 Reg. Sess.) (AB 481), which would have added Education Code section 49423.1. AB 481 stated that in the absence of a school nurse or other registered nurse, unlicensed school personnel "*shall*

administer assistance to pupils with diabetes" in accordance with (1) the "instructions set forth by the pupil's physician" and (2) certain "guidelines [the bill] established" providing for "instruction in the administration of ...insulin." AB 481 as enrolled Sept. 17, 2002, § 2, at 3-4 (ital. added). AB 481 thereby *required* that unlicensed school personnel "administer assistance"—including the "administration of ... insulin"—to students with diabetes.

Governor Davis vetoed AB 481, however, stating in his veto message that section 49423 "already provides that any pupil who is required to take prescription medication ... may be assisted by school personnel." Governor's Veto Message to Assem. on AB 481 (Sept. 26, 2002). The Governor added that, "while well-intentioned, [the bill] would create a costly new state reimbursable mandate" without an "appropriation for this purpose," and might fail to "protect" school personnel and school districts from "liability," notwithstanding "immunity from liability language." (*Id.*)

This veto message provides guidance on the state of the law surrounding AB 481. *See In re Marriage Cases*, 43 Cal.4th 757, 797 n.17 (2008) (relying on Governor's veto message). The message reflected an understanding that section 49423 *already authorized* what AB 481 would have *mandated*—that unlicensed school personnel may "assist" students with diabetes with medication, including "assisting"

them with the "administration of ... insulin"—in other words, that section 49423's reference to "assisting" includes "administering."[4]

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[4] The legislative history of Education Code section 49414.5 reflects opposition by organizations of registered nurses to the authorization of unlicensed school personnel to administer *glucagon* to students with diabetes in certain circumstances. *See, e.g.*, Assem. Com. on Health, Analysis of Assem. Bill No. 942 (2003-04 Reg. Sess.) as amended Apr. 24, 2003, at 5. That history, however, has no bearing on the meaning of section 49423, enacted years earlier.

Likewise, the legislative history of a failed amendment of Education Code section 49414.5 appears to reflect the same sort of opposition. In 2008, Senate Bill No. 1487 (2007-08 Reg. Sess.) (SB 1487) was introduced. SB 1487, as introduced Feb. 21, 2008. The bill would have amended Education Code section 49414.5 to add language stating that unlicensed school personnel were authorized to administer *insulin* alongside the provision's existing language stating that such personnel were authorized to administer *glucagon*. SB 1487, as introduced Feb. 21, 2008, § 1, at 2. But as noted, SB 1487 failed to pass. SB 1487, Current Bill Status, Dec. 4, 2008. The bill's introduction might suggest that some legislators believed that section 49423 did not authorize unlicensed school personnel to administer insulin and hence that the bill was needed. Alternatively, the bill's failure might suggest that some legislators believed that section 49423 *already* granted that authorization and hence that the bill was *not* needed. As a result, unenacted SB 1487 is of little value in interpreting section 49423. *See Grupe Devt. Co. v. Super. Ct.*, 4 Cal.4th 911, 923 (1993)

Lastly, a document the CDE issued in 2005, entitled "Program Advisory on Medication Administration," appears to reflect the same sort of registered nursing organization opposition. (2AA/483-514) In the document, the CDE "recommended" that unlicensed school personnel generally should "not administer medications that must be administered by injection," which would include insulin. (2AA/487-

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Finally, even if section 49423 remained ambiguous against the background of its legislative history, this Court would have to resolve the ambiguity in favor of the construction authorizing unlicensed school personnel to administer insulin to students with diabetes to avoid absurd consequences.

In Health and Safety Code section 1507.25(b), the Legislature authorized various unlicensed persons to administer insulin to foster children with diabetes. Such persons include (1) "relative caregiver[s]," (2) "nonrelative extended family member[s]," (3) "foster family home parent[s]," (4) "small family home parent[s]," (5) "certified parent[s] of a foster family agency," and (6) "[i]n the absence of a foster parent, designated substitute caregiver[s]"—i.e., babysitters. *Id.* § 1507.25(b)(2).

Since the Legislature presumably did not intend absurd consequences, it presumably intended in section 49423 to authorize unlicensed school personnel to administer insulin to students with diabetes. The Legislature expressed no doubt that the unlicensed persons listed in Health and Safety Code section 1507.25(b) could safely administer insulin to foster children; otherwise, it would not have granted them authorization to do so. There is no basis for

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88) But the CDE did not state or imply that such personnel were not authorized to do so.

discerning any similar doubt about unlicensed school personnel and hence no basis for denying them authorization to administer insulin to students.

Indeed, it would make no sense to authorize unlicensed school personnel to help students with diabetes self-administer insulin—which would include all acts preceding introduction of insulin into the body, such as drawing up insulin into a syringe or inputting the numbers in an insulin pump—but to deny such personnel authorization to administer insulin—which involves the introduction of insulin, as by pushing the syringe's plunger or the pump's buttons. Such a result would prohibit unlicensed school personnel from performing the easiest part of the process—the part even young children learn to perform [3AA/721], while permitting them to do the harder parts. Translated outside the context of insulin, that result would allow unlicensed school personnel to measure out cough syrup or eye drops but prohibit them from putting the syrup into the student's mouth or the drops into the student's eye—an untenable result.

In sum, section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes.

c. Section 2725

Business and Professions Code section 2732 ("section 2732") is a part of the Nursing Practice Act, which regulates "professional nursing" by registered nurses. *Id.* § 2700.

Section 2732 states that "[n]o person shall engage in the practice of [registered] nursing, as defined in Section 2725, without holding a license which is in an active status issued under this [act] except as otherwise provided in this act." The "practice of [registered] nursing" means "those functions, including basic health care, that help people cope with difficulties in daily living that are associated with their actual or potential health or illness problems or the treatment thereof." § 2725(b).

Such nursing functions include "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." § 2725(b)(2). But to come within the practice of registered nursing, a nursing function must "require a substantial amount of scientific knowledge or technical skill." § 2725(b).

Appellants submitted evidence below that insulin administration does not require a substantial amount of scientific knowledge or technical skill and that unlicensed school personnel may safely undertake it. (3AA/720-24; 4AA/817-902; 6AA/1649-53)

Respondents submitted evidence attempting to show the opposite. (1AA/259-60; 2AA/273-74) Appellants' evidence overwhelmed respondents', showing the following: (1) insulin is almost always administered by unlicensed persons; (2) persons of all education and skill levels are routinely trained to administer insulin safely and actually do so; and (3) all of the major organizations of health-care professionals with expertise in diabetes agree that unlicensed school personnel can be trained to administer insulin safely. (3AA/720; 4AA/817-902; 6AA/1649-50) The trial court did not resolve this factual dispute, but did find that appellants had the better "public policy" position on whether unlicensed school personnel should be authorized to administer insulin to students with diabetes. (RT/27)

In the end, however, the evidentiary dispute was irrelevant. That is because the Legislature has already determined that insulin administration does not require a substantial amount of scientific knowledge or technical skill, with the result that unlicensed persons may undertake it. That is the lesson of Health and Safety Code section 1507.25, which, as noted, authorizes unlicensed persons, including babysitters, to administer insulin to foster children with diabetes. *See id.* § 1507.25(b)(2)(F). That is the even clearer lesson of Education Code section 49414.5, which authorizes elementary school students to administer insulin to themselves. These lessons accord with experience under federal law. For more than a decade, 42 C.F.R. section 409.33 has *excluded* injections as a "skilled nursing service[ ]" for purposes of payment under the Medicare Program. *See* 63 Fed. Reg. 26252, 26284, 26307 (May 12, 1998). "[W]ith the

evolving state of clinical practice over time, the administration of a subcutaneous injection has now become commonly accepted as a nonskilled service[.]" *Id.* at 26284. Indeed, "the most frequently administered type of subcutaneous medication is insulin, which has long been defined as a nonskilled service[.]" *Id.*[5]

But even if insulin administration requires substantial scientific knowledge or technical skill, that would not be the end of the story. Respondents' reading of section 2725 is that only a registered nurse

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[5] In 1988, the California Attorney General issued an opinion concluding that all "injections by hypodermic syringe"—including subcutaneous injections—"require a substantial amount of scientific knowledge or technical skill" within the meaning of section 2725, and therefore need to be given by a registered nurse. 71 Ops. Cal. Atty. Gen. 190, ___ [1988 WL 385204 at *8] (1988). That conclusion was based on a former version of 42 C.F.R. section 409.33, which at the time included all injections as a "skilled nursing service[ ]" for purposes of payment under the Medicare Program. 48 Fed. Reg. 12526, 12545 (Mar. 25, 1983). The 1988 Opinion, however, lost any vitality it might have had in ten years later when 42 C.F.R. section 409.33 was revised to exclude such injections. *See* 63 Fed. Reg. 26252, 26284, 26307 (May 12, 1998).

It may be noted that the Vocational Nursing Practice Act [Bus. & Prof. Code § 2840 et seq.] independently establishes that injections by hypodermic syringe do *not* require a "substantial amount of scientific knowledge or technical skill" within the meaning of section 2725. Although the Act does *not* require licensed vocational nurses to have a substantial amount of such knowledge or skill [*see id.* § 2859 (requiring only "technical, manual skill")], it nevertheless authorizes them to "[a]dminister medications by hypodermic injection" [*id.* § 2860.5(a)].

may perform various functions, including administering medications. But respondents' reading is not the only one. Another reading is that only a registered nurse may perform such functions *as a professional registered nurse*—i.e., "in rendering personal services" to the general public as a " 'means of livelihood.' " *City of Los Angeles v. Rancho Homes, Inc.*, 40 Cal.2d 764, 767 (1953). The latter reading is reasonable and respondents' reading is not.

First, the Nursing Practice Act purports to regulate "professional nursing" by registered nurses. It does not regulate any particular function that registered nurses happen to perform.

Second, many people—friends and family members, acquaintances and even strangers—commonly perform many functions registered nurses perform in caring for others, seeking to "ensure" their "safety, comfort, personal hygiene, and protection," engaging in "disease prevention and restorative measures" for their benefit, observing "signs and symptoms of illness, reactions to treatment, general behavior, [and] general physical condition," and, notably, seeing to the "administration of medications." § 2725(b).

The Nursing Practice Act acknowledges and accommodates this reality, since Business and Professions Code section 2727 ("section 2727") "does not prohibit" (1) the "[g]ratuitous nursing of the sick by friends or members of the family" [§ 2727(a)], (2) "[n]ursing services in case of an emergency" [§ 2727(d)], or (3) performing "such duties as required in ... carrying out medical orders prescribed by a licensed

physician; provided, such person shall not in any way assume to practice as a professional, registered, graduate or trained nurse." § 2727(e). Section 2727 thus reflects the Act's focus on regulating "*professional* nursing" by registered nurses [*id.* § 2700 (ital. added)]—rendering professional registered nursing services to the public. The Act does not require registered nurses to perform all functions registered nurses happen to perform, nor does it prohibit other persons from doing so.

Section 2727(a) meshes with section 49423. The "[g]ratuitous nursing" that non-registered nurses may offer is broad enough to cover the "assistance" that unlicensed school personnel may provide to students with respect to medication under section 49423. "Gratuitous nursing" is an especially apt description since the unlicensed school personnel who provide such "assistance" are not paid anything additional for taking on this task and may be chosen with the consent of the student's parent, foster parent, or guardian.

Section 2727(d) also meshes with section 49423. To offer "[n]ursing services in case of an emergency" under section 2727(d) is similarly broad enough to cover the assistance that unlicensed school personnel may provide students with respect to medication under section 49423. Although " '[e]mergency' ... *includes* an epidemic or public disaster" [§ 2727(d) (ital. added)], it is not *limited* to them. "Emergency" reasonably includes the situation presented by the shortage of school nurses, given the severe consequences that can

result if the administration of insulin is delayed or denied. (6AA/1505)

Lastly and most prominently, section 2727(e) meshes with section 49423. As explained, whenever unlicensed school personnel administer insulin to students with diabetes, they do so "as required in ... carrying out medical orders prescribed by a licensed physician." § 2727(e). By its terms, section 49423 provides that unlicensed school personnel may "assist[ ]" a student with "medication" only in accordance with a "written statement from the [student's] physician detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken." § 49423(a), (b)(1). Section 49423 thereby effectively provides that unlicensed school personnel may assist a student with diabetes by administering insulin only as required in carrying out the medical orders of the student's physician.

In sum, section 2725 does not require that only registered nurses may administering insulin, nor does it prohibit other persons from doing so.

d. Harmonizing Section 49423 And Section 2725

Properly read, there is no inconsistency between section 49423 and section 2725—the former authorizes unlicensed school personnel to administer insulin to students with diabetes and the latter does not prohibit them from doing so.

But if there were any doubt, this Court would be duty-bound to read the statutes in such a fashion to avoid serious constitutional questions.

Under the Supremacy Clause of Article VI of the United States Constitution, state law is unconstitutional and hence invalid to the extent that it "frustrates the full effectiveness of federal law." *Perez v. Campbell*, 402 U.S. 637, 652 (1971). State law frustrates federal law's full effectiveness when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *accord English v. General Electric Co.*, 496 U.S. 72, 79 (1990). Here, the federal laws at issue consist of Section 504, the Americans with Disabilities Act, and the IDEA, which together grant students with diabetes a right to a free appropriate public education—including the right to receive insulin as a related service in order to have meaningful access to such an education. The narrow reading of section 49423 that respondents favor would inevitably result in denying students their rights.

In passing AB 481 in 2002, the Legislature found that "[t]here is a significant shortage of school nurses throughout the state, with only 2,469 ... school nurses for more than 6,000,000 children in our public schools," making "[a]ccess to diabetes care on public school campuses ... a significant problem." AB 481 as enrolled Sept. 17, 2002, § 1(a), at 3. In vetoing the bill, the Governor did not dispute that finding.

Thus, to read section 49423 to authorize unlicensed school personnel to administer insulin to students with diabetes enables those students to realize their rights under federal law.

Conversely, to read the statute to prohibit such administration would frustrate those rights. *Cf. Jevne v. Super. Ct.*, 35 Cal.4th 935, 956 (2005) (California Standards for Neutral Arbitrators would "impede or impair accomplishment of the goals of the [National Association of Securities Dealers] Code, and thereby the goals of the [Securities Exchange Act]," by "increasing administrative costs").

Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996), illustrates. That case involved a Hawaii statute and implementing regulation that imposed a 120-day quarantine for all carnivorous animals entering the state. The Court held that those provisions denied visually-impaired individuals guide dog services needed for mobility and safety, in violation of their right to access to state services, programs, and activities that the Americans with Disabilities Act grants. *Id.* at 1485. The Court acknowledged the quarantine provisions' legitimacy as seeking to protect "public health and safety" by keeping the state "one of the few places in the world which is completely free from rabies." *Id.* at 1481, 1485. Nevertheless, finding it "incumbent upon the courts to insure that the mandate of federal law is achieved," the Court held the quarantine could not stand as to guide dogs of visually-impaired individuals without reasonable modification. *Id.* at 1485-86. Here, as in *Crowder*, even if section 2725 prohibited unlicensed school personnel from administering insulin to students with diabetes, it

could not stand under federal law given that there are not, and will not be, enough licensed personnel to do so. Indeed, if a 120-day limited quarantine of guide dogs could not survive scrutiny, certainly the unlimited prohibition against the administration of insulin by unlicensed school personnel cannot as well.[6]

The state may, of course, choose *how* to make the right to a free appropriate public education a reality. But it cannot create a system that makes that right an illusion for students with diabetes, as would result from respondents' reading of state law. Given the absence of any alternative, the state must be deemed to have effectively provided for a free appropriate public education through section 49423 by authorizing unlicensed school personnel to administer insulin.

e. The Legal Advisory Is Consistent With Section 49423 And Not Inconsistent With Section 2725; The Trial Court's Contrary Conclusion Was Therefore Erroneous

We have shown that section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes and

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[6] In its 2006 "Medication Administration Assistance," the CDE acknowledged the force of federal law. Although it implied that section 49423 does not constitute "clear statutory authority ... permitting" unlicensed school personnel "to 'administer' insulin" to students with diabetes, it also implied that such personnel *had* such authority if the student has an "IEP" or "Section 504 plan" and "requires" insulin. (7AA/1709)

that section 2725 does not prohibit them from doing so. For this reason, the Legal Advisory is consistent with the former and not inconsistent with the latter. Indeed, the Advisory is more restrictive than these statutes, since it states that unlicensed school personnel may administer insulin *only* if he or she has been adequately trained, *only pursuant* to the orders of the student's treating physician as the student's Section 504 Plan or IEP requires, and *only if* a school nurse or other licensed person is unavailable. (5AA/1109) The Legal Advisory thus imposes more stringent conditions on administering insulin than the Nursing Practice Act—indeed, more stringent conditions than Health and Safety Code section 1507.25 imposes on babysitters of foster children. *See* Health & Saf. Code § 1507.25(b) and discussion *ante*.

In sum, the Legal Advisory is consistent with section 49423 and is not inconsistent with section 2725. For this reason, the trial court erred in declaring the Advisory invalid to the extent it states that unlicensed school personnel are authorized to administer insulin to students with diabetes. (RT/55-60; 8AA/2019-20)

The trial court explained how it arrived at its conclusion, but in so doing, showed that it erred as to both section 49423 and section 2725 and as to preemption.

For one thing, the trial court read section 49423 wrong. The court stated that "assist" and "administer" are "fundamentally different." (RT/58) The words *are* different, but not in the way the

court believed. As noted, "administering medication to a pupil or *otherwise* assisting a pupil in the administration of medication"—as the regulations implementing section 49423 consistently state—means that "assisting" is the *including* term and "administering" is the *included* term. Thus, as noted, "*assisting* a pupil in the administration of medication" includes administering medication as well as helping with self-administration.

The trial court also read section 2725 wrong. The court took section 2725 to prohibit unlicensed school personnel from "administering" insulin to students with diabetes. Section 2725 only prohibits non-registered nurses, including unlicensed school personnel, from rendering professional registered nursing services to the public. On this point, the court relied on a statement, entitled "Administration of Insulin" [2AA/293-96], issued by the BRN after respondents brought the present action as "entitled to some deference" on the proper construction of section 2725. (RT/57) Because the statement was unsound, the court's reliance was misplaced.

In "Administration of Insulin," the BRN disagreed with the Legal Advisory to the extent that it states that unlicensed school personnel are authorized to administer insulin to student with diabetes. (2AA/295) The BRN reasoned that "[a]dministration of medications, including insulin, is a nursing function" under section 2725 restricted to registered nurses alone and "may not be performed" by a non-registered nurse "unless expressly authorized" pursuant to Business and Professions Code sections 2795 and 2799. (*Id.*)

It is true that, as with any agency interpretation of a statute, the BRN's interpretation of section 2725 is "entitled to consideration and respect." *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1, 7 (1998). But the BRN's interpretation is subject to independent review. *Id.* at 8 (review of agency interpretation of law is the " 'independent judgment of the court' "). So reviewed, it fails scrutiny.

First, the BRN was wrong in stating that the "[a]dministration of medications, including insulin, is a nursing function" under section 2725 restricted to registered nurses. (2AA/295) The Vocational Nursing Practice Act [Bus. & Prof. Code § 2840 et seq.] removes from any registered nursing monopoly the administration of all "medications by hypodermic injection" [Bus. & Prof. Code § 2860.5(a)], including insulin.[7]

Second, even if the BRN were right in stating that the "[a]dministration of medications, including insulin, is a nursing function" under section 2725 restricted to registered nurses [*id.*], it would not follow that only a registered nurse may administer insulin. Rather, the statement means only that a registered nurse alone may administer medications *in rendering professional registered nursing services to the public.*

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[7] *See* n.5, *ante.*

Third, the BRN was also wrong in stating that the "[a]dministration of medications, including insulin, ... may not be performed by an unlicensed person unless expressly authorized" by Business and Professions Code sections 2795 and 2799. (*Id.*) Specifically, section 2795 states only that "[e]xcept as provided in" the Nursing Practice Act, "it is unlawful for a person" who is not a registered nurse either "[t]o practice or to offer to practice nursing in this state" as a registered nurse or "[t]o use any title, sign, card, or device to indicate that he or she is qualified to practice or is practicing nursing" as a registered nurse. This means nothing more than that only a registered nurse may render professional registered nursing services to the public. Less still does section 2799 purport to impose any "express-authorization" condition. It merely declares that any violation of the Nursing Practice Act is a misdemeanor punishable by county jail imprisonment or fine or both. *Id.*

Although the BRN's reasoning is not entirely clear, its premise seems to be that the Legislature has imposed an "express-authorization" condition on all statutes generally with respect to the administration of medications by persons other than registered nurses. Accordingly, the reasoning goes, Health and Safety Code section 1507.25 properly authorizes various unlicensed persons—including babysitters—to administer insulin to foster children with diabetes because it does so *expressly*. By contrast, the reasoning continues, section 49423 does not properly authorize unlicensed school personnel to administer insulin to students with diabetes because it does so only *impliedly*.

The only basis for this premise is the rule of statutory construction *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of another. But this rule is inapplicable. For one thing, the rule operates *within* a statute, by supporting an inference that the presence of one term implies the absence of a similar one. *See In re Sabrina H.*, 149 Cal.App.4th 1403, 1411 (2007) (*expressio unius* "is generally applied to a specific statute, which contains a listing of items to which the statute applies"). It does not operate *across* statutes, by supporting an inference that the presence of a certain term in one statute implies the absence of a similar term in another statute. *See id.* at 1412 (presence of provisions in Welf. & Inst. Code authorizing detention and placement of dependent children within the United States does not imply absence of provisions in Family Code authorizing detention and placement of dependent children outside the United States).

In any event, *expressio unius* "is inapplicable ... 'where no reason exists why persons or things other than those enumerated should not be included, and manifest injustice would follow by not including them.' " *People v. Rojas*, 15 Cal.3d 540, 551 (1975). Here, there is no reason to conclude that the Legislature intended to authorize unlicensed babysitters to administer insulin to foster children with diabetes, but to deny such authorization to unlicensed school personnel with respect to students with diabetes. Moreover, such a conclusion would produce an odd and unjust result, making insulin available to foster children at home but not to any students, including foster children, at school.

Lastly, the trial court misapprehended preemption. The court said that because statutes like section 2725 and Health and Safety Code section 1507.25(b) "identify licensed health care professionals" and "certain unlicensed persons" (including babysitters of foster children) "who are qualified to administer insulin," those statutes thereby "rul[e] out any basis for ... preemption." (8AA/2020) But as shown, federal law grants students with diabetes a right to a free appropriate public education and a corresponding right to administration of insulin as a means to that end. Consequently, federal law grants such students something more that a bare statutory "identification" of "licensed ... professionals" and "unlicensed persons." In any event, California law escapes preemption in this regard—not because it is immune from invalidation, but because through section 49423 it authorizes unlicensed school personnel to administer insulin to students with diabetes.

B. The Trial Court Erred In Declaring The Legal Advisory Invalid On The Ground That It Is Subject To, But Non-Compliant With, The APA

The trial court's second conclusion was that the Legal Advisory constitutes an APA "regulation" that the CDE did not adopt in compliance with the APA's procedural requirements. (8AA/2021) This determination, too, was erroneous.

1. Standard Of Review

This Court reviews the trial court's conclusion independently. *See, e.g., County of San Diego v. Bowen*, 166 Cal.App.4th 501, 517 (2008) ("Whether an agency action constitutes a regulation [subject to the APA] is a question of law that we review de novo."); *Grier v. Kizer*, 219 Cal.App.3d 422, 435 (1990), *disapproved on another ground in Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 577 (1996) (implying as much as to whether agency action was adopted in compliance with APA). Independent review applies because the trial court's determination of the Legal Advisory's procedural validity entails the application of statutory law to agency action, which this Court reviews de novo. *E.g., 20th Century*, 8 Cal. 4th at 271-72 (whether agency action is "consistent ... with the law" is "examined independently").

2. The Trial Court's Conclusion Fails Independent Review

a. The APA And Its Applicability To "Regulations"

The APA provides that, as a general matter, any "regulation" that an "agency" adopts "may be judicially declared invalid" if it "substantially fails to comply" with certain "procedural requirements" [*Morning Star Co. v. State Bd. of Equalization*, 38 Cal.4th 324, 333 (2006) (internal quotation marks omitted)]—including public notice of the proposed regulation, issuance of its text with a statement of reasons, opportunity for and written response to public comment, and

transmission of the file to the Office of Administrative Law for review.

The APA defines "agency" to mean "state agency" [Gov't Code § 11342.520] and in turn defines "state agency" to mean "every state office, officer, department, division, bureau, board, and commission" [*id.* § 11000(a)]. Likewise, the APA defines "regulation" to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." *Id.* § 11342.600. There are "two principal identifying characteristics" of a "regulation"—a "regulation" is a "rule" that (1) "must" be "intend[ed]" by the agency "to apply generally" and (2) "must 'implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.' " *Tidewater*, 14 Cal.4th at 571 (quoting Gov't Code § 11342(g)).

But not everything an agency issues is a "regulation" subject to the APA. For example, an agency's statement of its understanding of the law and intent to comply does not qualify. *See Excelsior College v. California Bd. of Registered Nursing*, 136 Cal.App.4th 1218, 1239 (2006) (BRN decision that "merely confirmed that ... graduates" of an out-of-state nursing school "would be required to comply" with a provision of the Nursing Practice Act requiring completion of specified course of instruction was not a "regulation"; BRN did not

adopt a "regulation" "merely by enforcing the actual language of the statute").

In addition, not every APA "regulation" is subject to the APA's procedural requirements. Rather, the APA declares its procedural requirements inapplicable to a "regulation that embodies the only tenable interpretation of a provision of law." *Id.* § 11340.9(f).

b. The Legal Advisory Is Not An APA "Regulation" And In Any Event Is Not Subject To The APA's Procedural Requirements

The Legal Advisory interprets section 49423 against the background of Section 504, the Americans with Disabilities Act, and the IDEA. (5AA/1097-1109) In doing so, however, the Advisory is not an APA "regulation." It is, rather, merely a statement by the CDE of its understanding of the law and its intent to comply. *See Excelsior College*, 136 Cal.App.4th at 1239.

Even if the Legal Advisory were an APA "regulation," it was not subject to the APA's procedural requirements. *That* is because it was the only tenable interpretation of section 49423—i.e., the statute could " 'reasonably be read in only one way[.]' " *Morning Star*, 38 Cal.4th at 336. Against the background of the federal rights at issue, and without conflict with section 2725, section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes. It matters not that respondents advanced, and the trial court adopted, a different interpretation of section 49423. *Cf. MacKinnon v.*

Truck Ins. Exchange, 31 Cal.4th 635, 647 (2003) (" 'The pollution exclusion clause [in the standard commercial general liability insurance policy] does not become ambiguous merely because the parties disagree about its meaning [citation], or because they can point to conflicting interpretations of the clause by different courts.' "). The single tenable interpretation of section 49423 is that it authorizes unlicensed school personnel to administer insulin to students with diabetes.

Finally, even if the Legal Advisory were an APA "regulation" subject to its procedural requirements, it need not be invalidated for any non-compliance since the law that the Advisory interprets would remain in effect. As the Supreme Court explained in *Tidewater*, to require a court to invalidate any "regulation" where the agency had not complied with all APA procedural requirements might require the court to strike down "regulations" that are substantively correct. 14 Cal.4th at 577. Rather, "although the court must void an interpretive regulation that does not comply with the APA procedures," it may nevertheless interpret the underlying statute itself. *Capen v. Shewry*, 155 Cal. App. 4th 378, 391 (2007). The court's interpretation will bind the agency and obviate the need for further administrative process. "[S]ince an administrative agency is mandated to follow the judicial interpretation of a statute, once that occurs there is ... no interpretive regulation that it could enact." *Id.* at 390.

The key inquiry is whether the court is in a position to independently assess the validity of the agency's interpretation of the

statute or whether it must defer to agency expertise as developed in the administrative process. Where a proper interpretation depends on factual determinations within the agency's field of expertise, the court should invalidate the regulation and require the agency to make the needed factual determinations in the first instance. *See Morning Star*, 38 Cal.4th at 341. But where the court need only interpret the statute, it is in "as good a position as the [agency] ... to interpret" it. *Id.* at 340-41. In such a case, if the court agrees with the agency's interpretation of the statute, it may adopt that interpretation without remanding to the agency.

So it is here. All this Court is called on to do is to interpret the federal and state statutes in question, and needs no agency expertise to interpret them. There is accordingly no reason for the Court to decline to interpret the statutes or to leave their interpretation to the CDE in the first instance.

Indeed, such a course would ill serve judicial economy, as litigation on the interpretation of these statutes would likely continue after APA-compliant regulations were adopted until a court finally interpreted the statutes itself. Interpreting section 49423 to authorize unlicensed school personnel to administer insulin to students with diabetes would leave the CDE with the task of implementing and enforcing that interpretation, "since an administrative agency is mandated to follow the judicial interpretation of a statute." *Capen*, 155 Cal. App. 4th at 390; *see* Ed. Code § 33308 (the CDE "shall administer and enforce all laws ... imposing any duty, power, or

function upon any of the bodies, offices, officers, deputies, or employees" subject to it); *see also Salazar v. Eastin*, 9 Cal.4th 836, 845 & n.4 (1995) (noting a trial court injunction directing the CDE and the Superintendent to issue a legal advisory to school districts informing them of a court of appeal decision that a statutory provision was unconstitutional).

In other words, it would be an idle act to require the CDE to adopt a procedurally "valid" statement in the Legal Advisory's place to make the same substantively correct statement of the law. "Since a purpose of the rulemaking procedures is to provide a hearing at which parties affected by a proposed rule could contribute to its formulation, there would be no point to such a hearing" where, as here, "nothing could come of it." *Capen*, 155 Cal.App.4th at 390 n.7.

c. The Trial Court's Contrary Conclusion Was Erroneous

The trial court's only comment on the APA issue was that the Legal Advisory is a "guideline, instruction or rule to be generally applied by school districts in implementing students' IEPs and Section 504 Plans." (8AA/2021) But even if the Advisory were an APA "regulation," it was not subject to the APA's procedural requirements

and in any event need not be invalidated for any non-compliance since it states the law correctly.[8]

V. CONCLUSION

This Court should fulfill the promise of the federal and state laws that were enacted to protect children with diabetes from discrimination and ensure their safety at school. Doing so requires this Court to reverse the trial court's judgment, vacate its peremptory writ of mandate, and direct it to deny respondents' petition and enter judgment for appellants.

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[8] In rendering judgment, the trial court did not need to reach two claims respondents had raised—that in issuing the Legal Advisory, (1) the CDE violated section 3.5 of article III of the California Constitution, and (2) the CDE and the Superintendent violated Education Code section 33031 and Government Code section 11152, respectively. Those claims were meritless in any event.

Under article III, section 3.5 an agency may not "declare a statute unenforceable" or "refuse to enforce" it "unless an appellate court has made a determination that such statute is unconstitutional." Respondents asserted that the CDE refused to enforce the Nursing Practice Act and specifically Section 2725. The CDE did no such thing—and couldn't have. The CDE lacks the power to enforce the Nursing Practice Act and hence does not possess the power to refuse to do so. Instead, it merely issued the Legal Advisory, which, as shown, is not inconsistent with section 2725 and is consistent with section 49423. And because the Advisory was not inconsistent with the law (i.e., § 2725)—the predicate for violating Education Code section 33031 and Government Code section 11152—the CDE did not violate those statutes.

DATED: October 28, 2009.

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.

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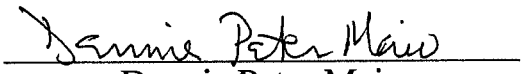
WORD COUNT CERTIFICATE

This Appellant's Opening Brief contains 13,106 words (including footnotes, but excluding tables and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on October 28, 2009, at San Francisco, California.



Dennis Peter Maio

PROOF OF SERVICE

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

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105. On October 29, 2009, I served the following document(s) by the method indicated below:

OPENING BRIEF OF APPELLANT AMERICAN DIABETES ASSOCIATION

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

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 29, 2009, at San Francisco, California.

Eileen Kroll