No. _____

In The Supreme Court Of The State Of California

AMERICAN NURSES ASSOCIATION et al.,
Plaintiffs and Respondents,

vs.

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

AMERICAN DIABETES ASSOCIATION,
Intervener and Appellant.

PETITION FOR REVIEW OF AMERICAN DIABETES ASSOCIATION

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

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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In this petition, we cite to the following items thus:

The slip opinion of the Court of Appeal majority as "Maj.Opn."

The slip concurring opinion of Presiding Justice Scotland as "Conc.Opn."

The Appellant's Appendix as "AA."

The Reporter's Transcript as "RT."

The Appellant's Opening Brief as "AOB."

The Appellant's Reply Brief as "ARB."

The petition for rehearing as "Petn.Rehg."

I.
PETITION

Intervener and Appellant American Diabetes Association (ADA) petitions for review of the decision of the Court of Appeal for the Third Appellate District (per Cantil-Sakauye, J., with Sims, J.; Scotland, P.J., conc.), announced in an opinion certified for publication.

The Court of Appeal affirmed a judgment of the Sacramento County Superior Court in an action brought by Plaintiffs and Respondents American Nurses Association et al. (collectively, the Nurses Associations), against Defendant and Appellant State Superintendent of Public Instruction Jack O'Connell and Defendant and Appellant California Department of Education (collectively, the CDE).

Almost immediately after issuance of a Legal Advisory by CDE resulting from settlement of a federal civil-rights action, the Nurses Associations initiated the present proceeding against the CDE in the Sacramento County Superior Court. ADA, one of the plaintiffs in the federal action, was granted leave to intervene.

The Nurses Associations sought a declaration that a provision of the Legal Advisory was invalid. The provision states that, when a school nurse or other licensed person is unavailable to administer insulin to a student with diabetes, unlicensed school personnel may do so, provided that they have volunteered and have been adequately

trained, in order to implement the student's rights under federal civil-rights statutes. The Nurses Associations claimed that the challenged provision of the Legal Advisory was inconsistent with California law, which allegedly prohibited unlicensed school personnel from administering insulin, and that the alleged prohibition was not preempted by the federal civil-rights statutes.

The Superior Court declared that the challenged provision of the Legal Advisory was invalid. Although expressly acknowledging that the outcome adversely affected not only the education of students with diabetes but also their health and safety [*see* RT/27], the court nevertheless upheld the Nurses Associations' claims.

The Court of Appeal affirmed. It did so in spite of the fact that one of its members expressly acknowledged the adverse effect of the outcome for students with diabetes [*see* Conc.Opn. at 1-2] and the others did not even impliedly disagree [*see* Maj.Opn. at 38-39].

Following the Court of Appeal's decision, ADA submitted a petition for rehearing, but met with summary denial.

A copy of the Court of Appeal's opinion is attached as Exhibit A. A copy of the court's order summarily denying the petition for rehearing is attached as Exhibit B.

II.
ISSUES PRESENTED FOR REVIEW

Section 504 of the Rehabilitation Act of 1973 (Section 504) [29 U.S.C. § 794], Title II of the Americans with Disabilities Act (the Americans with Disabilities Act) [42 U.S.C. § 12101 et seq.], and the Individuals with Disabilities Education Act (the IDEA) [20 U.S.C. § 1400 et seq.], are major federal civil-rights statutes. As pertinent here, they grant students with disabilities, including diabetes, a right to a free appropriate public education and related health care services, including the administration of insulin.

Subject to several exceptions, the Nursing Practice Act (NPA) [Bus. & Prof. Code § 2700 et seq.] prohibits any person without a license as a registered nurse from practicing nursing.

For its part, section 49423 of the Education Code authorizes both school nurses, who must be licensed as registered nurses, and other school personnel, who need not possess any license, to assist any student with medication, provided that certain conditions are met.

In pertinent part, the Legal Advisory states that, when a school nurse or other licensed person is unavailable to administer insulin to a student with diabetes, unlicensed school personnel may do so, provided that they have volunteered and have been adequately trained, in order to implement the student's rights under the federal civil-rights statutes.

In light of the foregoing, we present these issues for review:

1. Does the NPA prohibit unlicensed persons from administering medication to anyone, including prohibiting unlicensed school personnel from administering insulin to students with diabetes?

2. Does Education Code section 49423 authorize unlicensed school personnel to administer insulin to students with diabetes?

3. If the first issue is resolved affirmatively and the second negatively, is the resulting prohibition in California law against unlicensed school personnel's administration of insulin to students with diabetes preempted by the federal civil-rights statutes, at least when a school nurse or other licensed person is unavailable?

III.
WHY THIS COURT SHOULD GRANT REVIEW

Among the grounds on which this Court grants review is the need to "settle an important question of law." Cal. R. Ct. 8.500(b)(1).

In its published opinion, as a matter of first impression, the Court of Appeal interpreted the NPA as *prohibiting* unlicensed school personnel from administering insulin to students with diabetes, and more broadly as *prohibiting any* unlicensed person from administering *any* medication to *anyone* (outside of a few specific exceptions).

Also as a matter of first impression, the Court of Appeal interpreted Education Code section 49423 *not* to authorize unlicensed school personnel to administer *any* medication to *any* student, *including insulin to students with diabetes*.

And having so interpreted the NPA and Education Code section 49423, the Court of Appeal went on to conclude that the prohibition it discerned in California law against unlicensed school personnel's administration of insulin to students with diabetes was not preempted by the federal civil-rights statutes, even when a school nurse or other licensed person was unavailable.

This case presents indisputably important questions of law in need of settling by this Court, involving as they do the health and safety of students with diabetes in California public schools and indeed the health and safety of the state's residents generally.[1]

To begin with, the consequences of the Court of Appeal's decision are devastating for students with diabetes.

In California public schools, there are about 12,000 to 16,000 students with diabetes. Most of these students must take multiple doses of insulin daily to participate in the learning process and for

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[1] For the facts stated in this section, *see* AOB at 5-11; ARB at 1-3, 39-41, & Ex. A to ARB; and Petn. Rehg. at 2-4, 15-21.

their health and safety. While many older students are able to administer insulin to themselves and do not normally require an adult to assist them, most younger children need an adult to administer insulin to them. Insulin is needed at both predictable and unpredictable times, both at school and away from the school site.

The Court of Appeal's decision, prohibiting unlicensed school personnel from administering insulin, puts many of these students with diabetes at risk. California has suffered from a severe shortage of nurses, and particularly school nurses, and it will suffer from a shortage even more severe in the future. There simply are not enough school nurses to meet the insulin needs of students, and, even if there were, someone else would have to be available to administer insulin as a backup whenever a school nurse was unavailable for any reason, including while absent or attending to another student. If a student needs insulin but has no one available to administer it, the student is denied his or her rights under the federal civil-rights statutes and is put at risk of suffering serious short term and long term health complications.

Unlicensed school personnel—and unlicensed persons generally—have routinely been trained to safely administer insulin. Indeed, it is the position of the experts who have devoted their professional and personal lives to the care of people with diabetes that trained unlicensed persons can—and should—administer insulin in the absence of a licensed person. The position of these experts is supported by the United States Department of Education, the National

Institutes of Health, Centers for Disease Control, the American Medical Association, the American Academy of Pediatrics, the American Association of Clinical Endocrinologists, the American Association of Diabetes Educators, the American Dietetic Association, the Pediatric Endocrine Nurses Society, Children with Diabetes, and the Juvenile Diabetes Research Foundation.

Every day throughout California, people with diabetes—including children as young as 10 years of age—administer insulin to themselves, notwithstanding their lack of any license. So too do family members and caregivers of people with diabetes, again without any license. Today, insulin is administered almost always by unlicensed persons, and the methods for administration have been developed with this fact in mind.

Yet the devastating consequences of the Court of Appeal's decision are not limited to insulin and to students with diabetes. For example, unlicensed school personnel would be prohibited from administering Diastat, a medication that is designed to be routinely given by unlicensed persons to stop prolonged and potentially fatal seizures in persons with epilepsy. Similarly, unlicensed school personnel would be prohibited from administering eye drops, cough syrup, and even antibacterial creams used as first aid for minor playground injuries.

Neither are the devastating consequences of the Court of Appeal's decision limited to the school setting. For instance, in many

types of settings licensed by the California Department of Health Care Services and the California Department of Social Services, unlicensed persons are allowed by various regulations to administer medication to people dependent on their services. Such facilities include child care centers [*see* 22 Cal. Code Regs. § 101226(e)], adult residential facilities [*see id.* § 85065(f)(1)], intermediate care facilities [*see id.* §§ 73313(c), 76347(i)], and correctional treatment centers [*see id.* § 79635(a)(6)]. If the court's decision stands, unlicensed persons will be prohibited from administering medication in such settings and the people whom they will be put at needless risk.

To prevent such intolerable outcomes, unlicensed persons must not be prohibited from administering medication. And certainly, to prevent intolerable outcomes for students with diabetes who cannot administer insulin to themselves, unlicensed school personnel must not be prohibited from administering insulin, especially when a school nurse or other licensed person is unavailable.

The Court of Appeal believed that the NPA compelled these intolerable outcomes and that Education Code section 49423 did not prevent them in the school setting. The reverse is true. The NPA itself declares that the "protection of the public" is "paramount" to all "other interests sought to be promoted." Bus. & Prof. Code § 2708.1. And Education Code section 49423 make protection of the public paramount in schools. As a result, public protection calls for a result contrary to that of the court below.

To settle these important questions of law—and to vindicate the paramount goal of protection of the public—this Court should intervene here and now and grant review.

IV.
FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Court of Appeal adequately stated the procedural history of this action, which we incorporate by reference. (*See* Maj.Opn. at 3-6)

By contrast, the Court of Appeal failed to state the factual background to the action, an omission that we called to the court's attention on rehearing [*see* Petn.Rehg. at 2-4] and that we now make up for.

Diabetes is a serious, incurable disease, preventing the body from properly producing or using insulin to convert glucose, a sugar, from food into energy. (3AA/713; 6AA/1415)

Students with diabetes—numbering about 12,000 to 16,000 in California public schools [*see* 6AA/1410, 1493]—must generally take multiple doses of insulin daily, at both predictable and unpredictable times, both at the school site and away from it, to maintain appropriate blood glucose levels in order to survive. (3AA/713, 718-19; 6AA/1415, 1428-29)

High blood glucose levels, or hyperglycemia, can result from too little insulin, too much food, or decreased exercise, and may

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, characterized by labored breathing, weakness, confusion, and sometimes unconsciousness. (3AA/717-18; 6AA/1429) Over time, hyperglycemia leads to serious complications, including heart disease, blindness, kidney failure, and amputation. (6AA/1428)

Low blood glucose levels, or hypoglycemia, can result from too much insulin, too little food, or increased exercise, and can also 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)

Failing to time a dose of insulin for a student with diabetes correctly with food intake 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. (3AA/718-19) Of course, in addition to regularly scheduled meals, students frequently have snacks at unpredictable times during the school day or at school-sponsored activities, which may trigger the need for insulin administration at such times. (*Ibid.*) Further, students need additional insulin in response to elevated blood glucose levels, which can present themselves at unpredictable times

during the school day and on field trips and in extracurricular activities. (*Ibid.*)

Accordingly, to ensure the health and safety of students with diabetes and their ability to learn at full potential, there must be someone *constantly* available who can administer insulin at *all* of these times and places. (*Ibid.*)

That *someone* cannot be limited to a school nurse. California public schools have shown themselves incapable of providing for the administration of insulin to students with diabetes through school nurses or other licensed persons, and this situation is unlikely to improve. Certainly, arrangements for contracting for nursing services cannot accommodate the unpredictable times at which any given student may need insulin since such arrangements entail advance scheduling. As a result, schools have forced students to go without insulin when they need it—or have forced parents or guardians to administer insulin to make up for their failure.

V.
THE ISSUES ON REVIEW ARE PROPERLY RESOLVED IN FAVOR OF ALLOWING UNLICENSED SCHOOL PERSONNEL TO ADMINISTER INSULIN TO STUDENTS WITH DIABETES

Education Code section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes. In addition, the NPA does not prohibit them from doing so. If the NPA imposed the prohibition referred to and Education Code section 49423 did not

lift that prohibition, any such prohibition would be preempted by the federal civil-rights statutes, at least when—as stated by the Legal Advisory—a school nurse or other licensed person is unavailable. The Court of Appeal erred in concluding otherwise.

A. The NPA Does Not Prohibit Unlicensed School Personnel From Administering Insulin To Students With Diabetes

To begin with, the NPA does not prohibit unlicensed school personnel from administering insulin to students with diabetes.

The NPA states that, subject to several exceptions, "[n]o person shall engage in the practice of nursing." unless he or she "hold[s] a license which is in an active status" as a registered nurse. Bus. & Prof. Code § 2732.

The NPA, in turn, defines as nursing functions "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, and that require a substantial amount of scientific knowledge or technical skill," including four listed activities: (1) "indirect" as well as "[d]irect ... patient care services that ensure the safety, comfort, personal hygiene, and protection of patients ..."; (2) "indirect" as well as "direct ... patient care services, including, but not limited to, the administration of medications ..."; (3) the "performance of skin tests, immunization techniques, and the withdrawal of human blood ..."; and (4) not only

response to "signs and symptoms of illness, reactions to treatment, general behavior, or general physical condition ...," but also mere "[o]bservation" of such matters. *Id.* § 2725(b).

At the outset, the question arises whether the administration of insulin is a nursing function.

The answer is no.

First, the NPA does not declare that the administration of medication generally, or any other listed activity, is a nursing function *in the abstract*, but only when it *requires a substantial amount of scientific knowledge or technical skill.* The NPA could hardly be clearer. The four activities that it lists are nursing functions only if they "require a substantial amount of scientific knowledge or technical skill." *Ibid.*

Such a reading of the NPA is compelled by Opinion No. 87-106 of the Attorney General. The opinion concluded that the NPA "does not prohibit" unlicensed persons "from the administration of drugs ... in ways which do not require substantial scientific knowledge or technical skill." 71 Ops. Cal. Atty. Gen. 190, ___ [1988 WL 385204, at *8] (1988). The opinion did so because it recognized that the NPA "qualified" its definition of nursing functions "by the clause: 'which require a substantial amount of scientific knowledge or technical skill.' " *Id.* at ___ [1988 WL 385204, at *7].

In addition, such a reading of the NPA is confirmed by the Vocational Nursing Practice Act (VNPA) [Bus. & Prof. Code § 2840 et seq.], which provides that licensed vocational nurses may "[a]dminister medications," including "by hypodermic injection" [*id.* § 2860.5(a)], *without possessing a substantial amount of scientific knowledge or technical skill* [*see id.* § 2859].

If the NPA were given any other reading, such listed activities as "*indirect*" as well as "*[d]irect* ... patient care services that ensure the safety, comfort, personal hygiene, and protection of patients"—which include offering a steadying hand, positioning pillows, and helping with toileting—would have to be deemed to require a substantial amount of scientific knowledge or technical skill, and would accordingly have to be held to amount to nursing functions as a matter of law. Such a conclusion, however, would be absurd—and would have to be rejected as such [*see, e.g.*, *Metcalf v. County of San Joaquin*, 42 Cal.4th 1121, 1131 (2008)].

Second, the administration of insulin does not require a substantial amount of scientific knowledge or technical skill and hence is not a nursing function.

Indeed, outside of hospitals, insulin is almost always administered by unlicensed persons; persons of all education and skill levels are routinely trained to administer insulin safely and actually do so; and all of the major organizations of health-care professionals with expertise in diabetes agree that unlicensed persons can be trained to

administer insulin safely. (3AA/720; 4AA/817-902; 6AA/1649-50) Why else would the Legislative have authorized [*see* Ed. Code § 49414.5] students as young as elementary-school age to administer insulin to themselves?

But even if the administration of insulin were a nursing function, it would not matter.

To begin with, the administration of insulin—and indeed, the administration of medication generally—is *not* a nursing function *exclusively*, that is to say, it is *not* entrusted to registered nurses *alone*. The Board of Registered Nursing has itself admitted as much. *See* Board of Registered Nursing, An Explanation of the Scope of RN Practice, *available at* http://www.rn.ca.gov/pdfs/regulations/npr-b-03.pdf (as of July 16, 2010) (registered nurse may delegate nursing functions, including administration of medication). What is more, as noted, licensed vocational nurses may administer medication, including insulin, without possessing the substantial amount of scientific knowledge or technical skill required of registered nurses. *See* Bus. & Prof. Code §§ 2859, 2860.5(a).

Moreover, although, subject to several exceptions, the NPA prohibits unlicensed persons from *practicing* nursing, it does not purport to prohibit them from *engaging* in any *activity* that might happen to come within a nursing function.

To "practice" anything, including nursing, means being "*professionally* engaged in [it] <practice medicine>." Merriam-Webster's Online Dictionary, *available at* http://www.merriam--webster.com/dictionary/practice (as of July 16, 2010); *see* Bus. & Prof. Code § 2700 (the NPA governs "*professional* nursing" (italics added)). To be "professionally engaged" in anything implies, at a minimum, being involved 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).[2]

Whenever any unlicensed school personnel administers insulin to a student with diabetes, he or she is not *practicing* nursing because he or she is not engaged in nursing *professionally*. That is because, in administering insulin to the student, he or she acts solely and openly as an ad hoc volunteer carrying out the student's physician's written

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[2] Like the NPA, the VNPA contains a prohibition against the "performance of [vocational] nursing services" by a person without a license as a vocational nurse, but also contains an exception, "provided, that such person shall not in any way assume to practice as a licensed vocational nurse." Bus. & Prof. Code § 2861. The exception has been interpreted to mean that "services by an unlicensed person are not prohibited unless he or she assumes *to be licensed*"—that is to say, to be engaged in performing vocational nursing services professionally. 2 B.E. Witkin, *California Criminal Law* Crimes Against Public Peace and Welfare § 324, at 902 (3d ed. 2000) (italics added). There is no basis for interpreting the NPA's exception otherwise. Consequently, both the NPA and the VNPA include exceptions that allow unlicensed persons, including school personnel, to administer insulin.

medical orders, neither required to do so by any job description nor receiving any remuneration for the task.

If there were any doubt that the NPA does not prohibit unlicensed school personnel from administering insulin to students with diabetes, at least one of the several exceptions in the NPA would remove it.

By its terms, the NPA "does not prohibit" the "performance by any person of 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." Bus. & Prof. Code § 2727(e).

As stated, in administering insulin to a student with diabetes, any unlicensed school personnel acts solely and openly as an ad hoc volunteer carrying out the student's physician's written medical orders, neither required to do so by any job description nor receiving any remuneration for the task. Such orders are comprehensive and detailed, and specify exactly when insulin should be administered and how the proper dose should be calculated. In following these orders, unlicensed school personnel simply implement the physician specific directives, without any need for nursing assessment or judgment.

Accordingly, in administering insulin to a student with diabetes, any unlicensed school personnel does not undermine the purpose of the NPA but actually furthers it, treating the "protection of the public"

as "paramount" to all "other interests sought to be promoted" by the NPA. Bus. & Prof. Code § 2708.1.

The Court of Appeal, however, interpreted the NPA to prohibit unlicensed school personnel from administering insulin to students with diabetes. (Maj.Opn. at 8-20) It erred in doing so.

First, the Court of Appeal read out of the NPA's definition of nursing functions its qualifying clause, which expressly "require[s] a substantial amount of scientific knowledge or technical skill" [Bus. & Prof. Code § 2725(b)]. (Maj.Opn. at 12-15) It did so because it believed that, unless it did so, it would have served no purpose to list any activity. Hardly. The four activities listed clarify the scope of nursing functions, provided they "require a substantial amount of scientific knowledge or technical skill." By doing so, the listing serves a purpose crucial to an understanding of the NPA.

Second, the Court of Appeal read into the NPA's definition of nursing functions the administration of *any* medication or by *any method* injection—including insulin subcutaneously. (*Id.* at 16) Its only support, however, was a diffident statement in the Attorney General's Opinion No. 87-106 that the administration of any medication by any method of injection "*would appear* to require a substantial amount of scientific knowledge and technical skill." 71 Ops. Cal. Atty. Gen. at ___ [1988 WL 385204, at *8] (italics added). The opinion's only support, in turn, was a federal regulation that was subsequently revised in light of the fact that, "with the evolving state

of clinical practice over time, the administration of a subcutaneous injection has now become commonly accepted as a *nonskilled* service," and that the "the most frequently administered type of subcutaneous medication is insulin, which has long been defined as a nonskilled service[.]" 63 Fed. Reg. 26252, 26284 (May 12, 1998) (italics added).

Third, the Court of Appeal read the NPA's prohibition too broadly. (Maj.Opn. at 8-16) Contrary to its understanding, the NPA does not purport to prohibit unlicensed persons from *engaging* in any *activity* that might happen to come within a nursing function; it only prohibits them from *practicing* nursing.

Fourth, the Court of Appeal read the NPA's exception too narrowly. (*Id.* at 17-20) Contrary to its understanding, the meaning of the exception does not turn on whether "*assume* to practice as a professional, registered, graduate or trained nurse" [Bus. & Prof. Code § 2727(e) (italics added)] is used in the sense of either "feign" or "undertake." Whether any unlicensed person is "feigning" or "undertaking" to "practice as a professional, registered, graduate or trained nurse," he or she must still be feigning or undertaking to *practice* as a nurse of some sort—that is, to be "engaged in" nursing "professionally." As explained, in administering insulin to a student with diabetes, no unlicensed school personnel is engaged in nursing professionally. Notwithstanding the court's assertion, the exception, as so interpreted, would not "swallow" the prohibition itself. (Maj.Opn. at 19) Whereas the prohibition includes tasks "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" [Bus. & Prof. Code § 2725(b)(2)], the exception is limited to "carrying out medical orders prescribed by a licensed physician [*id.* § 2727(e)].

In conclusion, refusing to treat the "protection of the public" as "paramount" to all "other interests sought to be promoted" by the NPA [*id.* § 2708.1], the Court of Appeal erred in interpreting the NPA to prohibit unlicensed school personnel from administering insulin to students with diabetes.

B. Education Code Section 49423 Authorizes Unlicensed School Personnel To Administer Insulin To Students With Diabetes

Not only does the NPA not prohibit unlicensed school personnel from administering insulin to students with diabetes, Education Code section 49423 in fact authorizes them to do so.

Education Code section 49423 provides that a student "who is required to take, during the regular schoolday, medication prescribed for him or her by a physician or surgeon may be assisted" not only by a "school nurse," who by definition is licensed as a registered nurse, but also by "other ... school personnel," who need not be licensed at all. Ed. Code § 49423(a).

The Court of Appeal did not dispute that the word "assist" in Education Code section 49423 was broad enough to authorize administering medication to students as well as helping them administer it to themselves. (Maj.Opn. at 22-23) But it concluded that "'assist' ... means to help in whatever way is legally permitted by the specific individual who is doing the assisting" under some provision of law *other than Education Code section 49423* [*id.* at 22]—with the result that Education Code section 49423 makes no independent grant of authority to anyone.

According to the Court of Appeal, Education Code section 49423 authorizes school nurses to "assist" students with diabetes by administering insulin because they are "legally permitted" to administer medication including insulin by the NPA. (*Id.* at 23) In contrast, according to the court, Education Code section 49423 does *not* authorize unlicensed school personnel to "assist" students with diabetes by administering insulin because *they* are *not* "legally permitted" to administer insulin by any other provision of law. (*Id.* at 23-24)

It is evident that the gloss applied by the Court of Appeal to "assist" in Education Code section 49423, prohibiting unlicensed school personnel from administering medication to students, is alien to the provision. As its language declares, Education Code section 49423 has as its purpose to authorize unlicensed school personnel as well as school nurses to "assist" students with medication. At the time of Education Code section 49423's enactment [*see* Stats. 1976,

ch. 1010, § 2], no other provision "legally permitted" unlicensed school personnel to administer *any* medication. The court's prohibitory gloss would mean that the Legislature had performed an idle act, *expressly* "authorizing" unlicensed school personnel *to do nothing*. As the court admitted elsewhere, courts "presume that the Legislature does not engage in idle acts." (Maj.Opn. at 15)

Apparently recognizing that its prohibitory gloss on Education Code section 49423 is alien to the provision, the Court of Appeal sought to justify its application on four bases. It failed on each one.

First, the Court of Appeal reasoned that its prohibitory gloss on Education Code section 49423 was necessary to avoid conflict with the NPA. (Maj.Opn. at 23-24) There is no such conflict. As shown, whereas Education Code section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes, the NPA does not prohibit them from doing so. But even if there were such a conflict, it would not have mattered. Under a rule of statutory interpretation that the court acknowledged, but then proceeded to ignore, """[i]t is well settled ... that a general provision is controlled by one that is special, the latter being treated as an exception to the former."""" (Maj.Opn. at 16) The NPA is the general provision dealing with the administration of medication *in the world at large*, and Education Code section 49423 is the special provision dealing with the administration of medication *in schools*. As such, Education Code section 49423 is an exception to the NPA.

Second, the Court of Appeal reasoned that its prohibitory gloss on Education Code section 49423 was supported by the regulations implementing the provision [*see* 5 Cal. Code Regs. § 600 et seq.]. (Maj.Opn. at 24-25) Of course, the Education Code section 49423 regulations must respect the authorization that the provision grants to unlicensed school personnel. If Education Code section 49423 grants unlicensed school personnel authorization to administer insulin to students with diabetes—and it does—its implementing regulations cannot take that authorization away. *See, e.g., California Assn. of Psychology Providers v. Rank*, 51 Cal.3d 1, 11 (1990). Why then do the Education Code section 49423 regulations state and imply that unlicensed school personnel may administer medication to students "as allowed by law"? 5 Cal. Code Regs. § 604(b); *see id.* § 601(e)(2). The question practically answers itself. Even though, under Education Code section 49423, unlicensed school personnel are authorized to administer medication generally, under other provisions of law they may be subject to specified conditions for specified medications. *See* Ed. Code § 49414 (administration of epinephrine); *id.* § 49414.5 (administration of glucagon). No provision of law, however, subjects unlicensed school personnel to any conditions for administering insulin routinely.

Third, the Court of Appeal reasoned that its prohibitory gloss on Education Code section 49423 was supported by certain documents issued by the CDE. (Maj.Opn. at 25-28) In 2005, the CDE issued a document in which it "recommended" that unlicensed school personnel generally "not administer medications that must be

administered by injection," which would include insulin. (2AA/488-89) But the CDE did not state that such personnel were prohibited from doing so. The court attempted to read "recommended" out of the document. (Maj.Opn. at 26) But the word remains. Subsequently, in 2006, the CDE issued another document, which it soon withdrew, in which it stated that, in spite of Education Code section 49423, "there is no clear statutory authority in California permitting" unlicensed school personnel "to 'administer' insulin[.]" (7AA/1709) That statement, however, was based on the premise that "assist" in Education Code section 49423 does not include administering medication but is limited to helping with self-administration. As even the court acknowledged, that premise is unsound. (Maj.Opn. at 23) In any event, even if the CDE's documents had amounted to regulations, which they did not, they could not have trumped Education Code section 49423. *See California Assn. of Psychology Providers*, 51 Cal.3d at 11.

Fourth and final, the Court of Appeal reasoned that its prohibitory gloss on Education Code section 49423 was supported by "the Legislature's actions over the past decade in this area." (Maj.Opn. at 28-32) But as the court all but expressly acknowledged, the actions in question do not reveal any view by the Legislature as a body compelling its prohibitory gloss.

In conclusion, the Court of Appeal erred in interpreting Education Code section 49423 not to authorize unlicensed school personnel to administer insulin to students with diabetes.

C. In Any Event, The Federal Civil-Rights Statutes Would Preempt Any Prohibition In California Law Against Unlicensed School Personnel's Administration Of Insulin To Students With Diabetes, At Least When A School Nurse Or Other Licensed Person Is Unavailable

But even if the NPA prohibited unlicensed school personnel from administering insulin to students with diabetes, and even if Education Code section 49423 did not lift that prohibition, any such prohibition would be preempted by the federal civil-rights statutes, at least when a school nurse or other licensed person is unavailable. The Court of Appeal erred in concluding otherwise.

Under the Supremacy Clause of Article VI of the United States Constitution, federal law may preempt state law and thereby render it "without effect." *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819).

Federal law preempts state law when, among other things, state law "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).

"What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effect." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000).

> [W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course

> be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress ....

Savage v. Jones, 225 U.S. 501, 533 (1912).

To carry its burden of demonstrating that California law stood as a sufficient obstacle to congressional objectives to warrant preemption, ADA had to show that any state law prohibition against unlicensed school personnel's administration of insulin to students with diabetes would interfere with the federal civil-rights statutes, at least when a school nurse or other licensed person is unavailable.

To be sure, to carry its burden, ADA had to show something more than a "hypothetical or potential conflict" between federal and state law. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

But—contrary to the Court of Appeal's implication—ADA did *not* have to introduce evidence of "specific facts" to prove precisely "what number of schools" have students with diabetes or precisely "how many" students require the administration of insulin during the school day to establish a sufficient obstacle to congressional objectives to warrant preemption. (Maj.Opn. at 36) That is because "[w]hat is a sufficient obstacle is a matter of judgment." *Crosby*, 530 U.S. at 373. It is *not* a matter of evidence to prove quantifiable effects caused by state law. Put simply, the existence of an obstacle to

congressional objectives does not depend on the number or percentage of students who are denied their rights under the federal civil-rights statutes, so such evidence was unnecessary.[3]

As a practical matter, any prohibition in California law against unlicensed school personnel's administration of insulin to students with diabetes would interfere with the federal civil-rights statutes, at least when a school nurse or other licensed person is unavailable. Indeed, in the face of the severe shortage of nurses and especially school nurses in the present, and the projected increase in the severity of this shortage in the future, any such prohibition could hardly have any other effect.

Even though ADA did not have to introduce evidence to carry its burden to demonstrate a sufficient obstacle to warrant preemption, it chose to do so, filling hundreds of pages of the record. (*See* 3AA/624-5AA/1320; 6AA/1526-1680)

The evidence introduced by ADA—which the Court of Appeal failed to acknowledge even though its omission was brought to its

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[3] *See, e.g., Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324-31 (1981) (finding preemption of Iowa statutory and common law on abandonment of intrastate rail service by federal Interstate Commerce Acts, without proof of quantifiable effects); *Olszewski v. Scripps Health*, 30 Cal.4th 798, 814-27 (2003) (same as to preemption of California health-care-provider lien statutes by federal Medicaid statutes).

attention on rehearing [*see* Petn.Rehg. at 15-18]—showed that a conflict that was real and actual, and not at all "'hypothetical or potential'" [Maj.Opn. at 35] between any prohibition in California law against unlicensed school personnel's administration of insulin to students with diabetes, on the one side, and the federal civil-rights statutes, on the other, at least when a school nurse or other licensed person is unavailable. That conflict compelled preemption.

By way of example, Turner Elementary School in the Antioch Unified School District in Contra Costa County denied Nicole C.'s daughter access to the administration of insulin: The school did not have a school nurse or other licensed person available to administer insulin to the child whenever she needed it; in addition, it prohibited unlicensed school personnel from administering insulin even in the absence of a school nurse of other licensed person. (3AA/634-42) Among other things, the school indicated that it could not fill the gap by contracting for nursing services including by a licensed vocational nurse: It could arrange for such services *only by advance scheduling*, and hence could *not* arrange for them *at the unpredictable times they might be needed.* (3AA/641, 713, 718-19; 6AA/1415, 1428-29)

As a similar example, Oak Valley Elementary School in the Buellton Unified School District in Santa Barbara County denied Louise D.'s son access to the administration of insulin: The school did not have a school nurse or other licensed person available to administer insulin to the child whenever he needed it; in addition, it prohibited unlicensed school personnel from administering insulin

even in the absence of a school nurse or other licensed person. (3AA/669-79) The school did not fill the gap, but left it to Louise D., whom it characterized as "just a stay at home mom," to go to school and administer insulin whenever her child needed it. (3AA/673)

Unfortunately, the examples of Nicole C.'s daughter at Turner Elementary School and Louise D.'s son at Oak Valley Elementary School are not isolated.

There are similar examples involving James Stone's son at Stanislaus Elementary School in the Stanislaus Union School District in Stanislaus County [5AA/1149-55]; Stacey A.'s daughter at Greenbrook Elementary School in the San Ramon Valley Unified School District in Contra Costa County [5AA/1191-97]; Laurie C.'s daughter, also at the San Ramon Valley Unified School District's Greenbrook Elementary School [5AA/1248-56]; Erica C.'s daughter at the San Ramon Valley Unified School District's Rancho Romero Elementary School [5AA/1237-46]; and Shereé F.'s daughter at Haley Durham Elementary School in the Fremont Unified School District in Alameda County [5AA/1199-1211].

There are "widespread problems with insulin not being provided on a timely basis, or at all, in northern California schools" due, at least in part, to a "lack of available school nurses and a reluctance to utilize unlicensed personnel to administer insulin." (3AA/627-28)

There are similar "widespread problems with insulin administration in Central Valley California school districts. Many schools in these districts refuse to permit any school personnel to administer insulin to a child when a school nurse or other health care professional is not available on site," with the result that the schools make no one available to administer insulin. (3AA/794)

"Some school districts attempt to provide for insulin administration by having nurses (either a school nurse at another site or a contract nurse) who can be called to travel to a school when a student needs insulin," but such an "arrangement can result in significant delays in insulin administration," which in turn can result in harming the "academic performance or ability to learn" of students with diabetes and, worse still, their "health." (3AA/796, 799)

In introducing all of this evidence, ADA showed that there was a real and actual conflict compelling preemption between any prohibition in California law against unlicensed school personnel's administration of insulin to students with diabetes and the federal civil-rights statutes, at least when a school nurse or other licensed person is unavailable.

Under preemption analysis, ADA was not required to introduce further evidence to quantify the number of California public schools attended by students with diabetes or the number of students needing the administration of insulin. Preemption is not a numbers game, where only conflicts that affect large numbers of people—with

absolute certainty—are cognizable. Congressional objectives can be frustrated even if only a small number of students are denied their right of access to the administration of insulin.

Contrary to the view expressed by the Court of Appeal [*see* Maj.Opn. at 37-38], the facts in *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), are not materially distinguishable from the facts in this case—indeed, *Crowder* directly supports preemption here. In *Crowder*, the court considered Hawaii law that imposed a 120-day quarantine on all carnivorous animals entering the state. It held that the quarantine law denied visually-impaired people guide dog services in violation of their rights under the Americans with Disabilities Act. *Id.* at 1485. It acknowledged that the quarantine law was intended 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. But recognizing that it was "incumbent upon the courts to insure that the mandate of federal law is achieved," it held that the quarantine law could not stand as to guide dogs of visually-impaired people without reasonable modification. *Id.* at 1485-86.

In *Crowder*, the issue was not *how many* visually-impaired persons would be denied their rights under the Americans with Disabilities Act by Hawaii quarantine law; it was rather *whether the effects of the law, considered as a whole, would stand as an obstacle to congressional objectives in the Americans with Disabilities Act*—and the answer was yes.

Similarly in this case, the issue was not *how many* students with diabetes would be denied their rights under the federal civil-rights statutes by any prohibition in California law against unlicensed school personnel's administration of insulin; it was rather *whether the effects of the law, considered as a whole, would stand as an obstacle to congressional objectives in the federal civil-rights statutes*—and the answer, here too, was yes.

The Court of Appeal failed adequately to consider *Crowder*'s relevance to this case, seemingly because it perceived the denial of federal rights here to be less severe than there. (Maj.Opn. at 37-38). But the plaintiffs in *Crowder* did not present evidence of how widespread the problem was, nor were they required to demonstrate that large numbers of visually-impaired people would actually be deprived of their rights. In fact, it is possible that some visually-impaired people might have been able to exercise their rights without guide dog services, as by using a sighted companion. The *Crowder* court did not inquire into the specifics of each individual case; it simply looked at the readily-apparent impact of the quarantine as a general matter, and concluded that the quarantine stood as a sufficient obstacle to congressional objectives. The Court of Appeal should have done the same, and should have come to the same conclusion.

ADA showed that there are about 12,000 to 16,000 students with diabetes in California public schools, many of whom must take multiple doses of insulin daily, at both predictable and unpredictable times, to maintain appropriate blood glucose levels in order to survive.

Many younger students are unable to administer insulin to themselves; unless a school nurse or other licensed person were available at all times and all places during the school day, such a person alone could not meet a student's needs.

ADA also showed that there were many students with diabetes needing the administration of insulin attending many California public schools—including all those named above.

ADA further showed that many California public schools failed to provide for the administration of insulin to many students with diabetes—again including those named. They failed to do so because of the unavailability of a school nurse or other licensed person. And they failed to do so in spite of the availability of unlicensed school personnel who were ready, willing, and able.

The Court of Appeal expressed a belief that, in the future, California public schools might be able to provide for the administration of insulin to students with diabetes by "contract[ing] for the services of a licensed nurse, including as necessary a licensed vocational nurse, ... in order to meet the requirements of federal law." (Maj.Opn. at 36)

In fairness, just as ADA had to show something more than a hypothetical conflict between federal and state law to demonstrate preemption, the Court of Appeal had to offer something more than a

hypothetical "solution" of its own devising before it could dismiss the ADA's showing.

In any event, the evidence introduced by ADA precluded the belief that the Court of Appeal expressed. The past has shown California public schools incapable of providing for the administration of insulin to students with diabetes by contracting for nursing services or otherwise. The future is unlikely to show them any more capable. Contracting arrangements cannot accommodate the unpredictable times at which any given student may need insulin since such arrangements entail advance scheduling. They did not succeed in the past. There is no basis for speculating that they will succeed in the future.

As noted, failing to time a dose of insulin for a student with diabetes correctly with food intake 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. And, in addition to regularly-scheduled meals, students frequently have snacks at unpredictable times during the school day or at school-sponsored activities, which may trigger the need for insulin administration at such times. Further, they need additional insulin in response to elevated blood glucose levels, which can occur at unpredictable times during the school day or at school-sponsored activities. Accordingly, to ensure their ability to learn at full potential and indeed their very health and safety, they must have

someone *constantly* available who can administer insulin at *all* of these times and places.

Recall that, in pertinent part, the Legal Advisory states:

> When no expressly authorized person is available under categories 2-4 [viz., a school nurse or other licensed person] ..., 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.

(5AA/1109 (fn. omitted))

Manifestly, the Legal Advisory's statement is minimal. It is only if a school nurse or other licensed person is unavailable that any unlicensed school personnel need administer insulin to a student with diabetes, and then only if he or she has volunteered and has been adequately trained. Therefore, if school nurses or other licensed persons are *always* available, unlicensed school personnel need *never* administer insulin.

Even though the Legal Advisory's statement is minimal, it is necessary.

The Court of Appeal asserted that ADA did not meet its "burden to show it is necessary for unlicensed school personnel to administer insulin to diabetic students in order 'to insure that the mandate of federal law is achieved.' " (Maj.Opn. at 38)

In making that assertion, the Court of Appeal evidently assumed that a school nurse or other licensed person was, is, and will be always available. That assumption, however, does violence to the evidence and to common sense. If, as ADA has shown often to be the case, a school nurse or other licensed person is unavailable, is it not necessary for unlicensed school personnel to make themselves available, so long as they have volunteered and have been adequately trained? In such a circumstance, any prohibition in California law against unlicensed school personnel's administration of insulin to students with diabetes would stand as a sufficient obstacle to congressional objectives in the federal civil-rights statutes to warrant preemption. The federal civil-rights statutes grant each student with diabetes the right to a free appropriate public education; they do not compel such a student to sacrifice an education and gamble with his or her health.

In conclusion, the Court of Appeal erred in holding that any prohibition in California law against unlicensed school personnel's administration of insulin to students with diabetes would not be

preempted by the federal civil-rights statutes, at least when a school nurse or other licensed person is unavailable.[4]

VI.
CONCLUSION

For the reasons stated above, this Court should grant review to settle the important questions of law presented, in order to hold, after briefing and oral argument, that Education Code section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes and the NPA does not prohibit them from doing so, and that any prohibition would be preempted by the federal civil-rights statutes, at least when a school nurse or other licensed person is unavailable.

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[4] We note, in passing, that the Nurses Associations claimed that the challenged provision of the Legal Advisory was invalid not only *substantively* because it was allegedly inconsistent with the NPA and not supported by Education Code section 49423, but also *procedurally* because it was allegedly subject to, but not compliant with, the Administrative Procedure Act (APA) [Gov't Code § 11340 et seq.]. (Maj.Opn. at 5) The Superior Court agreed. (*Id.* at 6) The Court of Appeal, however, declined to address the issue. (*Id.* at 7) That is because the issue is of no practical consequence. Whether or not the challenged provision of the Legal Advisory is invalid under the APA, the underlying law remains controlling. *See Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 577 (1996). As shown, Education Code section 49423 authorizes, and the NPA does not prohibit, unlicensed school personnel's administration of insulin to students with diabetes; any prohibition would be preempted by the federal civil-rights statutes, at least when a school nurse or otherwise person is unavailable.

DATED: July 19, 2010.

DISABILITY RIGHTS EDUCATION
AND DEFENSE FUND, INC.

REED SMITH LLP

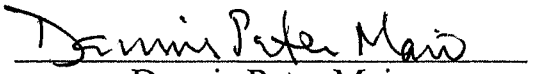
By _____
Dennis Peter Maio

Attorneys for Intervener and Appellant
American Diabetes Association

WORD COUNT CERTIFICATE

This Petition for Review contains 8,387 words (including footnotes, but excluding cover, tables and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on July 19, 2010, at San Francisco, California.



Dennis Peter Maio

EXHIBIT A

Filed 6/8/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

AMERICAN NURSES ASSOCIATION et al., Plaintiffs and Respondents, v. JACK O'CONNELL, AS SUPERINTENDENT OF PUBLIC EDUCATION etc. et al., Defendants and Appellants, AMERICAN DIABETES ASSOCIATION, Intervenor and Appellant.	C061150 (Super. Ct. No. 07AS04631)

APPEAL from a judgment of the Superior Court of Sacramento County, Lloyd G. Connelly, Judge. Affirmed.

Remcho, Johansen & Purcell, Robin B. Johansen, Kari Krogseng for Defendants and Appellants.

American Nurses Association, Alice L. Bodley, Maureen E. Cones; Pillsbury Winthrop Shaw Pittman, John S. Poulos, Carrie L. Bonnington; California Nurses Association, Pamela Allen for Plaintiffs and Respondents.

Reed Smith LLP, James M. Wood, Paul D. Fogel, Dennis Peter Maio; Disability Rights Education and Defense Fund, Inc., Arlene Mayerson, Larisa Cummings for Intervenor and Appellant.

In this case we consider not whether California law should, but whether California law does, allow designated voluntary school personnel, who are not licensed nurses, to administer insulin to diabetic students who require the injections under a Section 504 Plan (29 U.S.C. § 794; 34 C.F.R. § 104.1 et seq.) or Individualized Education Program (IEP) (20 U.S.C. § 1414, subd. (d)). Like the trial court, we conclude the answer is no. We shall affirm the judgment and peremptory writ of mandate issued by the trial court.

PROCEDURAL BACKGROUND

Federal law prohibits discrimination against students with disabilities through three federal acts: the Rehabilitation Act of 1973 (29 U.S.C. § 794) (Section 504), the Americans with Disabilities Education Act (42 U.S.C. § 12132), and the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) as amended by the Individuals with Disabilities Education Improvement Act of 2004 (Pub.L.No. 108-446, (Dec. 3, 2004) 118 Stat. 2647) (IDEA). Federal law recognizes students with disabilities have a right to receive a free appropriate public education, including related aids and services necessary for them to access that education. (34 C.F.R. §§ 104.33, 300.320, 300.323)[1]

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[1] California law similarly recognizes the right of students with disabilities to be free of discrimination (Gov. Code, § 11135) and to participate in free appropriate public education (Ed. Code, § 56000 et seq.).

In 2005, the American Diabetes Association (ADA) and several California public school students with diabetes, through their guardians, filed a class action suit against Jack O'Connell, in his capacity as the Superintendent of Public Schools for California, the Board of Education of California and the individual members of the Board of Education, the California Department of Education (CDE), and two local school districts and their superintendents. The federal plaintiffs alleged defendants violated the federal law by failing to ensure the provision of health care services to students with diabetes, including insulin administration, that was necessary to enable those students to obtain free appropriate public education. (*K.C. et al. v. O'Connell et al.*, No. C05-4077 MMC (N.D. Cal.)

The parties reached a settlement in 2007 which, among other things, required the CDE to issue a specific legal advisory regarding the rights of students with diabetes in California's K-12 public schools. Based on the parties' settlement agreement, the district court dismissed the federal action.

The CDE issued the legal advisory as required by the settlement agreement. As relevant to this case, the legal advisory takes the position that in order to comply with federal law, California law should be interpreted to allow, if a licensed person is not available or feasible, trained unlicensed school employees to administer insulin during the school day to a student whose Section 504 Plan or IEP requires such insulin administration. The legal advisory summarizes who may administer insulin in California schools as follows:

"Business and Professions Code section 2725[,subdivision](b)(2) and the California Code of Regulations, Title 5, section 604 authorize the following types of persons to administer insulin in California's public schools pursuant to a Section 504 Plan or an IEP:

"1. self administration, with authorization of the student's licensed health care provide[r] and parent/guardian;
"2. school nurse or school physician employed by the LEA [local education agency];
"3. appropriately 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. contracted 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. parent/guardian who so elect;
"6. parent/guardian designee, if parent/guardian so elects, who shall be a volunteer who is not an employee of the LEA; and
"7. unlicensed voluntary school employee with appropriate training, but only in emergencies as defined by Section 2727[,subdivision](d) of the Business and Professions Code (epidemics or public disasters).

"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 orders as required by the Section 504 Plan or the IEP.*" (Fn. omitted, italics added.)

Almost immediately, the American Nurses Association and the American Nurses Association/California (hereafter we will refer to all plaintiffs/petitioners as the Nurses Associations) filed this action against O'Connell as Superintendent of Public

Instruction and the CDE (hereafter together, CDE) challenging section 8, the portion of the legal advisory that permits unlicensed school employees to administer insulin to students with diabetes. The Nurses Associations alleged, as pertinent on appeal, that section 8 is inconsistent with the Nursing Practice Act (NPA) (Bus. & Prof. Code, § 2700 et seq.) and is an illegal regulation implemented by the CDE without compliance with the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.). The trial court granted the ADA leave to intervene and file a complaint in intervention in support of the CDE's legal advisory. Subsequently, first and second amended petitions for writ of mandate and complaints for declaratory and injunctive relief were filed adding the California School Nurses Organization and the California Nurses Association as plaintiffs/petitioners. Documentary evidence was submitted. The matter was briefed and argued.

In its ruling on the case, the trial court agreed that as a matter of policy, unlicensed trained school personnel should be authorized to administer insulin to diabetic students, but found they were not authorized to do so under current law. The court concluded California law authorizes "the administration of insulin to a student only by a licensed health care professional acting within the scope of practice for which he or she is licensed under the Business and Professions Code (e.g., a nurse licensed under the [NPA], Business and Professions Code section 2700 et seq., to perform services within the meaning of Business and Professions Code section 2725) or by an unlicensed person

who is expressly authorized by statute to administer insulin in specified circumstances . . . ." The trial court concluded Education Code sections 49423 and 49423.6 did not authorize the CDE to permit unlicensed school personnel to administer insulin if they were not otherwise statutorily permitted to do so. The trial court rejected the contention that the state statutes conflict with or impede implementation of the federal requirements for the administration of insulin by qualified personnel. "Rather the statutes identify licensed health care professionals and certain unlicensed persons who are qualified to administer insulin, ruling out any basis for federal preemption." The trial court determined the challenged portion of the Legal advisory was invalid under current law. The trial court also concluded, as an alternative ruling, that the challenged portion of the Legal advisory was invalid as a regulation which had not been adopted in accordance with the APA.

The trial court issued a peremptory writ of mandate directing the CDE to refrain from implementing or enforcing the portions of the Legal advisory that authorize the administration of insulin to students by school personnel who are not authorized to administer it under state statutes and to remove those portions from its legal advisory.

The CDE and the ADA appeal. We granted the motion of the ADA, joined in by the CDE, to confirm the automatic stay of the judgment pending appeal.

We now conclude the trial court correctly determined the portion of the legal advisory, authorizing unlicensed designated school personnel to administer insulin to diabetic students in nonemergency situations, is inconsistent with California law and therefore, invalid. We need not reach the trial court's alternate basis for invalidating the challenged portion of the legal advisory under the APA.

DISCUSSION

The ADA and CDE (appellants) contend the trial court erroneously invalidated the challenged portion of the legal advisory by reading Business and Professions Code section 2725 (section 2725) too broadly and Education Code section 49423 (section 49423) too narrowly. Appellants claim the trial court failed to construe these two statutes in harmony so as to avoid frustrating federal law. Appellants claim the legal advisory is consistent with section 49423 and not inconsistent with section 2725.

The Nurses Associations contend the NPA prohibits unlicensed persons from performing the functions of a nurse, that section 2725 includes the administration of medications as a function of a nurse, and that there is no statutory exception to section 2725, even under section 49423, allowing unlicensed school personnel to administer insulin injections to students absent an emergency or epidemic. The Nurses Associations argue the trial court properly determined federal law does not preempt the licensing requirements of the NPA. We conclude the Nurses Associations have the better legal argument.

I.

Unlicensed School Personnel Lack Statutory Authority To Administer Insulin To Students Who Require The Injections Under a Section 504 Plan Or IEP

A. Standard of Review

The applicable standard of review in this case, as the parties agree, is de novo review since the issue of whether the challenged portion of the legal advisory is authorized by California law turns on the interpretation of the applicable statutes. (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425; *Boyer v. Jones* (2001) 88 Cal.App.4th 220, 222.)

B. The Nursing Practice Act (NPA)

(1) *The Definition Of Nursing In The NPA*

"The original California statutes dealing with registered nurses did not expressly define or restrict their functions but merely provided for their certification or registration. (Stats. 1908, ch. CDV, § 1, p. 533; Stats. 1913, ch. 319, § 1, p. 613.)" (64 Ops.Cal.Atty.Gen. 240, 243, fn. 6 (1981).) Since 1939, however, the NPA has provided an express statutory definition of the functions of a nurse (§ 2725) and has prohibited "the practice of nursing," as defined in section 2725, without holding a license as a registered nurse (Bus. & Prof. Code, § 2732). (Stats. 1939, ch. 807, § 2, pp. 2349-2350.) Indeed, it is a misdemeanor under the NPA to either practice nursing without an active license *or* to use any title, sign, card or device to indicate a qualification to practice

nursing unless the person has been duly licensed as a nurse. (Bus. & Prof. Code, §§ 2795, 2799.) It is a misdemeanor to impersonate a professional nurse or pretend to be licensed to practice nursing. (Bus. & Prof. Code, §§ 2796, 2799.) Thus, contrary to the argument of appellants that the NPA "provides that only a registered nurse may engage in the practice of registered nursing *as a professional registered nurse*," the NPA does more than prevent individuals from holding themselves out as registered nurses in the performance of nursing duties.[2] It also affirmatively restricts unlicensed persons from performing the functions of a licensed nurse. We turn to the question of whether administering an insulin injection is a function of a licensed nurse as defined by section 2725.

"'"As in any case involving statutory interpretation, our fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose." [Citation.]' [Citation.] Statutory interpretation begins with an analysis of the

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[2] The Nurses Associations complain that this and a number of other arguments by appellants were not raised before the trial court. Appellants have pointed us to several sections of the record in support of their claim that they did "expressly or by implication" raise all the arguments. We have reviewed the sections to which appellants cite and find appellants did raise the claim that the NPA only restricts persons from practicing *as* registered nurses. We do not find, however, the other arguments about which the Nurses Associations complain. Nevertheless, we exercise our discretion to consider all the points argued by the ADA and the CDE as they involve legal questions regarding the proper interpretation of the statutes and do not require the consideration of any conflicting facts. (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1287-1288.)

statutory language. [Citation.] 'If the statute's text evinces an unmistakable plain meaning, we need go no further.' [Citation.] If the statute's language is ambiguous, we examine additional sources of information to determine the Legislature's intent in drafting the statute. [Citations.]" (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1147.) We may also provisionally examine legislative history and other extrinsic matters to confirm a plain meaning construction. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046; see *City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 795.)

Prior to 1974, section 2725 defined the practice of nursing as "the performing of professional services requiring technical skills and specific knowledge based on the principles of scientific medicine, such as are acquired by means of a prescribed course in an accredited school of nursing . . . , and practiced in conjunction with curative or preventive medicine as prescribed by a licensed physician and the application of such nursing procedures as involve understanding cause and effect in order to safeguard life and health of a patient and others." (Stats. 1968, ch. 348, § 1.)

In 1974, the California Legislature revised section 2725 (Stats. 1974, ch. 355, § 1; Stats. 1974, ch. 913, § 1) and since that time, subdivision (b) of section 2725 has defined the "practice of nursing" as "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, and that require a substantial amount of scientific knowledge or technical skill, *including all of the following*: [¶] . . . [¶] (2) Direct and indirect patient care services, including, but not limited to, *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 . . . ." (Italics added.)

The plain language of section 2725, subdivision (b)(2) includes in the functions of a nurse as defined generally by subdivision (b) "the administration of medications" ordered by a physician. (§ 2727, subd. (b)(2).) While the NPA does not define the term "administration," we find guidance (see 64 Ops.Cal.Atty.Gen., *supra,* at p. 242, fn. 5) in the Pharmacy Law (Bus. & Prof. Code, § 4000 et seq.) which defines "administer" as "the direct application of a drug . . . to the body of a patient . . . by *injection*, inhalation, ingestion, or other means." (Bus. & Prof. Code, § 4016, italics added.) Similarly, the California Uniform Controlled Substances Act (Health & Saf. Code, § 11000 et seq.) defines "administer," in pertinent part, as "the direct application of a controlled substance, whether by *injection*, inhalation, ingestion, or any other means to the body of a patient for his immediate needs . . . ." (Health & Saf. Code, § 11002, italics added.) There is nothing in the NPA to indicate a different meaning of the term "administer." It is a general rule of statutory construction to construe words or phrases in one statute in the

same sense as they are used in a closely related statute pertaining to the same subject. (*In re Do Kynung K.* (2001) 88 Cal.App.4th 583, 589; *Estate of Hoertkorn* (1979) 88 Cal.App.3d 461, 465-466.) The parties do not dispute insulin is a medication. Therefore, the injection of insulin into diabetic students would appear to fall within the "administration of medications"--a practice of nursing.

The ADA and the CDE argue against this plain meaning construction of section 2725. They contend only those administrations of medication that require "a substantial amount of scientific knowledge or technical skill" (§ 2725, subd. (b)) fall within the definition of the practice of nursing.[3] Appellants rely on a portion of a 1988 opinion of the California Attorney General that considered whether a hired home care companion could administer drugs to his or her employer. (71 Ops.Cal.Atty.Gen. 190 (1988).) The opinion considered, among other things, the definition of nursing in section 2725. (71 Ops.Cal.Atty.Gen., *supra*, at pp. 197-199.) The opinion stated the belief that the Legislature's purpose in identifying "the administration of medications and therapeutic agents, necessary

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[3] In connection with this argument, the ADA has filed with its reply brief a request for judicial notice of a state of Ohio trial court opinion, *State ex rel Lancaster School Dist.*, No. 03 CVH 02 1443 (Ohio Ct. of Common Pleas, March 6, 2006), which considered Ohio's Nursing Practices Act in light of another Ohio statute that authorized the Ohio Board of Education to adopt a policy for administration of drugs by employees. The Nurses Associations oppose the request on several grounds. We find the Ohio decision unhelpful in considering the intent of the California Legislature in adopting section 2725 in 1974 and deny the ADA's request for judicial notice on that basis.

to implement a treatment . . . regimen ordered by . . . a physician" as a nursing function in section 2725, subdivision (b), "was not to add conduct which did not require a substantial amount of scientific knowledge or technical skill into the definition of the practice of nursing but to assure that the actions which introduce medications and therapeutic agents into the body of a patient which do require a substantial amount of scientific knowledge or technical skill, such as injections by hypodermic syringe, were included in the definition of the practice of nursing." (71 Ops.Cal.Atty.Gen., *supra*, at p. 198.) Appellants argue this statement supports the conclusion that administration of medication is not the practice of nursing unless it involves a substantial amount of scientific knowledge or technical skill.[4]

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[4] Appellants acknowledge the Attorney General's opinion identifies injections as a practice of nursing. In fact, the opinion goes on to expressly include an "injection by hypodermic syringe into a blood vessel, muscle or under the skin" as requiring a substantial amount of scientific knowledge or technical skill. (71 Ops.Cal.Atty.Gen., *supra*, at p. 198.) But appellants contend this portion of the opinion is no longer valid because the federal regulation it was based upon has been amended to exclude subcutaneous injections such as insulin. Actually, the Attorney General's opinion did not base its conclusion on the federal regulation. It only found its conclusion was "bolstered" by the federal regulation, which admittedly has since been amended to exclude subcutaneous injections from the definition of skilled nursing services for purposes of the Medicare Program. (42 C.F.R. § 409.33.) The amended federal regulation sheds no light on the California Legislature's intent in enacting the language of section 2725.

Appellants then point to the evidence they submitted to the trial court that showed insulin administration does not require a substantial amount of scientific knowledge or technical skill and that unlicensed school personnel may be trained to safely undertake it. Appellants claim their evidence "overwhelmed" the Nursing Associations' contrary evidence.

Appellants assert, in the end, however, the evidentiary conflict is irrelevant because the Legislature, by enacting other statutes, has already determined insulin administration does not require a substantial amount of scientific knowledge or technical skill. Appellants point to the statute allowing students to self-administer insulin with parental permission and physician authorization (Ed. Code, § 49414.5, subd. (c)), the statute identifying several categories of persons who can be trained and permitted to administer insulin to a foster child in placement (Health & Saf. Code, § 1507.25, subd. (b)), and the statute authorizing licensed vocational nurses to administer injections. (Bus. & Prof. Code, § 2860.5, subd. (a).) We reject each of these arguments.

To begin with, we are not persuaded the Legislature intended to require a factual inquiry into each specific "administration of medication" to determine whether it involves "a substantial amount of scientific knowledge or technical skill" before it can be determined to be the practice of nursing within the meaning of section 2725. The Legislature could have reached such a result simply by defining the practice of nursing as those functions that involve a substantial amount of

scientific knowledge or technical skill and stopping there. The language of section 2725, subdivision (b), however, goes on to include the administration of medications--without any limitation or qualification--as a nursing function. The identification of the administration of medications as an included nursing function appears to represent a conclusion of the Legislature that such activity involves a substantial amount of scientific knowledge or technical skill. To read it otherwise risks making the language in subdivision (b)(2) unnecessary and we generally avoid an interpretation that renders any portion of a statute superfluous, unnecessary, or a nullity because we presume that the Legislature does not engage in idle acts. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 634.) Therefore, we question the 1988 opinion of the Attorney General to the extent it suggests the amount of scientific knowledge or technical skill in each administration of medication must be weighed before it can be determined that it is the practice of nursing.[5]

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[5] Subsequent to the filing of this action, the Board of Registered Nursing (BRN) issued a position statement declaring the "[a]dministration of medications, including insulin, is a nursing function." The BRN's interpretation of section 2725 is normally "entitled to consideration and respect" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7) and supports our plain meaning construction here. However, the authority of the BRN's policy statement is, in our view, undercut somewhat by the fact it was issued by the BRN in express view of this already pending litigation brought by the

In any event, we note that for the purposes of this case injections of every kind have long been considered to be included in the practice of nursing in California. (71 Ops.Cal.Atty.Gen., *supra,* at p. 198.) Therefore, even if an inquiry into the amount of scientific knowledge or technical skill involved could be appropriate under section 2725, we would not reach the evidentiary conflict in this case over whether injections of insulin are currently considered to require a substantial amount of scientific knowledge or technical skill.

Finally, we are not persuaded that the Legislature's authorization of student self-administration of insulin (Ed. Code, § 49414.5, subd. (c)), the administration of insulin to foster children (Health & Saf. Code, § 1507.25, subd. (b)), and the administration of injections by licensed vocational nurses (Bus. & Prof. Code, § 2860.5, subd. (a)), represents a legislative determination that injections of insulin are not the practice of nursing. Instead, these statutes represent the Legislature's decision to except these situations from the prohibition of the practice of nursing generally found in section 2725. "'It is well settled, also, that a general provision is controlled by one that is special, the latter being treated as an exception to the former.'" (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; accord *People v. Superior Court* (2002) 28 Cal.4th 798, 808.)

Nurses Associations. We acknowledge, but do not rely on the policy statement as authority for our decision.

(2) *General Exceptions In The NPA*

We consider next whether the administration of insulin to students by unlicensed school personnel as authorized by the CDE's Legal advisory falls within any of the exceptions to the prohibition of unlicensed nursing practice contained in the NPA. (Bus. & Prof. Code, § 2727 (section 2727).) Appellants argue three of them may apply.

First, section 2727 provides: "This chapter does not prohibit: [¶] (a) Gratuitous nursing of the sick by friends or members of the family." Appellants argue "gratuitous nursing" is broad enough to cover unlicensed school personnel administering insulin injections to students at the request of the student's parent, foster parent, or guardian. We do not need to reach the question of whether such school personnel would be providing these services "gratuitously." We conclude the broad category of unlicensed school personnel does not fall within the class of friends or family members. "Friends or members of the family" as used in section 2727, subdivision (a), refers to persons with a pre-existing position of family trust who agree to gratuitously provide the nursing. While there may be individual situations where an unlicensed school employee coincidentally happens to be a member of the student's family or is a family friend outside the school context, the language of section 2727, subdivision (a), cannot reasonably be construed to generally include school personnel as family or friends.

Section 2727 also provides: "This chapter does not prohibit: [¶] . . . [¶] (d) Nursing services in case of an

emergency. 'Emergency,' as used in this subdivision includes an epidemic or public disaster." Appellants argue this exception includes epidemics or public disasters, but is not limited to them. According to appellants, this emergency exception could reasonably apply to the situation presented by the shortage of school nurses being currently experienced in California. We disagree. "*Ejusdem generis* (literally, 'of the same kind') [citations], means that where general words follow specific words, or specific words follow general words in a statutory enumeration, the general words are construed to embrace only things similar in nature to those enumerated by the specific words. [Citation.]" (*California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 189.) Applying the maxim here, the enumeration of epidemics and public disasters limits the emergency exception in section 2727, subdivision (d), to situations similar in nature to such events. Such events are characterized by being extraordinary, often sudden, wide-spread events requiring immediate response. They are not long-term, chronic situations of difficulty such as presented by a shortage of school nurses. They are not the regular administration of medication to a student pursuant to the student's Section 504 Plan or IEP.

Section 2727 provides: "This chapter does not prohibit: [¶] . . . [¶] (e) The 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." Appellants claim this exception allows unlicensed school personnel to administer insulin to students as instructed by the student's physician. We disagree.

The language of this exception is qualified by the express proviso that "such person shall not in any way *assume* to practice as a professional, registered, graduate or trained nurse." (§ 2727, subd. (e), italics added.) The dictionary contains two potentially applicable meanings for the word "assume" used in this proviso. First, "assume" may mean "to take to or upon oneself: UNDERTAKE[.]" (Merriam-Webster's Collegiate Dictionary (11th ed. 2006) p. 75, col. 1.) Or "assume" may mean "to pretend to have or be: FEIGN[.]" (*Ibid.*) If we were to accept the second meaning, appellants' argument might be persuasive. However, the exception as so construed would expand to nearly swallow the rule of section 2725 and would potentially upset the careful balancing of responsibilities otherwise established by the Legislature for other patient caregivers, for example, vocational nurses. (Bus. & Prof., § 2860.5.) It would undermine provisions of the NPA (specifically Business and Professions Code sections 2732, 2795 and 2796), which we have already explained prohibit unlicensed persons from practicing nursing, not just holding themselves out as nurses. Moreover, we do not find it likely the Legislature intended unlicensed school personnel to be covered by this exception when we consider the Legislature's various actions relating to the administration of medications to students, as we

discuss *post*. We believe the word "assume" in section 2727, subdivision (e), should be interpreted to mean to "undertake" the practice of nursing. So construed, the exception of section 2727, subdivision (e), does not permit unlicensed school personnel to administer medications, including insulin, even though the student may have a prescription for those medications from his or her doctor.

In summary, we have found the injections of insulin to be the administration of medication, a nursing function under section 2725. We have found no exception in the NPA for unlicensed school personnel to administer insulin injections to students as proposed by the legal advisory issued by the CDE. We consider next the Education Code provisions regarding the administration of prescribed medications to students, which appellants claim should be interpreted to allow insulin injections to students by unlicensed school personnel.

C. The Education Code Provisions

Section 49423 provides, in relevant 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" (§ 49423, subd. (a)), provided the pupil's physician or surgeon provides a written statement "detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken" and 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, subd. (b)(1).)[6]

The critical phrase in this statute is "may be assisted[.]" (§ 49423, subd. (a).) Appellants contend close examination of the statute shows a student's right to "assistance" with medication includes "administration" of medication. Appellants point out that section 49423 authorizes both licensed school personnel (e.g., the school nurse) and unlicensed school personnel to assist students. Appellants contend the word "assist" is broad enough to include administration because the dictionary definition of "assist" is to "help" or "aid." (Merriam-Webster's Collegiate Dictionary, *supra*, p. 74, col. 2.) Since school nurses, who are registered nurses, may undoubtedly "assist" by administering medication, appellants claim the term should be given the same meaning for unlicensed school personnel, who should also be allowed to "assist" by administering medication. Appellants argue "assist[]" is the "*including* term" and "administer[]" is the "*included* term."

Several principles of statutory construction are implicated here. Of course, in determining the intent of the Legislature so as to effectuate the purpose of the statute, we always start with the actual language of the statute as it is the best

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[6] The substance of section 49423 was first added to the Education Code as Education Code section 11753.1 in 1968. (Stats. 1968, ch. 681, § 1.) Section 49423 itself was first enacted in 1976 (Stats. 1976, ch. 1010, § 2) as part of the reorganization of the Education Code. (Stats. 1976, ch. 1010, as amended by Stats. 1976, ch. 1011, operative April 30, 1977.)

indicator of such intent. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1152; *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1086.) In considering the language, we presume that the Legislature had in mind existing and related laws when it enacted or amended the statute. (*Lewis C. Nelson & Sons v. Clovis Unified School Dist.* (2001) 90 Cal.App.4th 64, 72, fn. 18.) We are also mindful that "'[w]hen two statutes touch upon a common subject, they are to be construed in reference to each other, so as to "harmonize the two in such a way that no part of either becomes surplusage." [Citations.] Two codes "'must be read together and so construed as to give effect, when possible, to all the provisions thereof.'"' [Citation.]" (*San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 836; see *Mejia v. Reed* (2003) 31 Cal.4th 657, 663.)

Applying these principles, we conclude the word "assist" in section 49423 means to help in whatever way is legally permitted by the specific individual who is doing the assisting. We explain.

The word "assist" does mean to help or aid. (Merriam-Webster's Collegiate Dictionary, *supra*, p. 74, col. 2.) A person may help or aid with medication in any number of ways, including by administering the medication when the patient is unable to take the medication by himself or herself. Help or aid (assistance) with medication, however, may also be provided by a variety of other means. A person may assist with medication, for example, by checking the correct medication is

being taken, by removing the cap from a prescription bottle or by pouring out the prescribed dose into a cup or spoon. These are forms of assistance in a person's self-administration of medication. Conceivably, a person might assist with medication even though someone else other than the patient administers the medication. For example, a person can be in charge of properly storing the medication for use. Thus, "assistance" is a broader concept than "administration," although it may include administration as appellants suggest.

The Legislature did not use the term "administration" in section 49423, but used the broader term of assistance. The use of the broader term covers all of the various kinds of assistance that might be useful to a student. However, we assume the Legislature was aware of the NPA in enacting section 49423 and we construe the word "assist" in section 49423 in light of the NPA's restrictions on the practice of nursing. Section 49423 may be harmonized with section 2725 by reading the language of section 49423 that a pupil "may be assisted by the school nurse or other designated school personnel" (§ 49423, subd. (a)) as an authorization of the school nurse to assist in all ways a school nurse is allowed to assist and an authorization of other designated school personnel to assist in all ways they are allowed to assist. Since a school nurse, as a registered nurse, is authorized to administer medications, the assistance by the school nurse includes the administration of medications. But the assistance by other designated school personnel would not include the administration of medications

unless they are licensed nurses or fall within some other express statutory authorization or statutory exception to the prohibition of the practice of nursing. The assistance of unlicensed designated school personnel, therefore, would not normally include the administration of medications.

The regulations regarding the administration of medications in the public schools pursuant to section 49423, adopted by the CDE as required by Education Code section 49423.6, support our interpretation of the language of section 49423.[7]

The CDE regulations recognize section 49423 authorizes a school nurse and other designated school personnel to assist students with prescribed medications during the school day. (Cal. Code Regs., tit. 5, § 600.) The regulations define "'other designated school personnel'" as "any individual employed by the local education agency who: [¶] (1) [h]as consented to administer the medication to the pupil or otherwise assist the pupil in the administration of medication; and [¶] (2) *[m]ay legally administer the medication to the pupil or otherwise assist the pupil in the administration of the medication.*" (Cal. Code Regs., tit. 5, § 601, subd. (e), italics added.) As we have discussed, the school nurse or other licensed school district employees are the individuals who "may legally administer" medications. Unlicensed school personnel may legally "otherwise" assist, i.e., assist in other ways.

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[7] Education Code section 49423.6 required the CDE to adopt regulations regarding Education Code section 49423.

The regulations go on to provide, "[a] school nurse may administer medication to a pupil or otherwise assist a pupil in the administration of medication *as allowed by law* and in keeping with applicable standards of professional practice." (Cal. Code Regs., tit. 5, § 604, subd. (a), italics added.) "Other 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, subd. (b), italics added.) The pupil's parent/legal guardian or an individual designated by the pupil's parent/legal guardian may administer medication to the pupil or otherwise assist the pupil in the administration of medication "as allowed by law." (Cal. Code Regs., tit. 5, § 604, subds. (c) & (d).) Thus, the regulations appear consistent with our view that section 49423 allows students to receive help with their medications in whatever way is legally permitted for the specific individual who is doing the assisting.

Indeed, the record reflects the CDE itself understood the law to generally preclude unlicensed school personnel from assisting diabetic students by administering insulin injections to them, at least until the federal litigation that resulted in the challenged Legal advisory.

In 2005, the CDE issued a "Program Advisory" on the administration of medication to students. In the advisory, the CDE discussed, among other statutes, section 49423 and its

implementing regulations. Among its recommendations, the CDE specifically instructed local educational agencies that an "unlicensed staff member does not administer medications that must be administered by injection[.]" Appellants now claim the Program Advisory only "recommended" that unlicensed school personnel "should" not administer medications that must be administered by injection and that "the CDE did not state or imply that such personnel were not authorized to do so." We do not read the language of the Program Advisory to be quite so permissive. The Program Advisory did not state unlicensed school personnel "should" not administer injections, but that an unlicensed staff member "does not" administer injections. Moreover, any ambiguity was dispelled by the publication issued by the CDE the next year.

In 2006, the CDE published a document answering "Frequently Asked Questions" regarding "Medication Administration Assistance in California[.]" In answer to the question of whether unlicensed school personnel could administer insulin to K-12 students, the CDE responded "No." The CDE provided the following explanation: "California law states, with a few clearly specified legal exceptions, that only a licensed nurse or physician may administer medication in the school setting, these exceptions are situations where [¶] The student self-administers the medication, [¶] A parent or parent designee, such as a relative or close friend, administers the medication, or [¶] There is a public disaster or epidemic[.]" (Fns. omitted.) The response went on to state that section 49423

"permits the school nurse or other designated school personnel to 'assist' students who must 'take' medication during the school day that has been prescribed for that student by his or her physician. The terms 'assist' and 'administer' are plainly not synonymous. An example of an unlicensed school employee 'assisting' a student pursuant to . . . section 49423 would be when the school secretary removes the cap from the medication bottle, pours out the prescribed dose into a cup or a spoon, and hands the cup or spoon to the student, who then 'takes' or self-administers the required medication. There is no clear statutory authority in California permitting that same unlicensed school employee to 'administer' insulin, diastat, or any other parenteral medication, with the . . . statutory exception of epinephrine via auto-injector and glucagon."

Appellants bring to our attention a footnote in the 2006 document, which stated that a student with a Section 504 Plan or IEP who requires medication during the school day "is entitled to receive such medication in accordance with his or her written plan." Appellants now claim this was an implied statement by the CDE that unlicensed school personnel have authority to administer insulin if the student has an IEP or Section 504 Plan and requires insulin. Actually, given the express statements in the CDE's document regarding the lack of authority of unlicensed school personnel to administer insulin, the reference in the footnote regarding students with Section 504 Plans or IEPs can most reasonably be read as an acknowledgement that schools are

required to ensure students receive their prescribed insulin as allowed by law, i.e., from licensed personnel.

Appellants also claim the 2006 document was simply wrong. According to appellants, "section 49423's language says what it says. The CDE's understanding of that language cannot change its meaning or set up any kind of estoppel. For the determination of . . . section 49423's meaning is solely and finally a 'judicial function.'" True; interpretation of a statute is a judicial function (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 470), but when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute is entitled to consideration and respect by the courts. (*Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th 1, 7; *Dept. of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (2008) 166 Cal.App.4th 911, 917.) Prior to the issuance of the challenged Legal advisory, it is apparent the CDE understood section 49423 and its own implementing regulations to preclude the administration of insulin injections to diabetic students by unlicensed school personnel. This accords with our construction of the statute.

Before we move on, we pause to consider the Legislature's actions over the last decade in this area. Specifically, both parties bring to our attention, but draw different conclusions from, the Legislature's attempts over the last few years to address the administration of medications, including insulin, to students in public schools by unlicensed school personnel.

First in 2001, the Legislature adopted Education Code section 49414. (Stats. 2001, ch. 458 (A.B. 559), § 2.) Section 49414 allows schools to choose to provide emergency epinephrine auto-injectors to unlicensed but trained personnel and to allow those personnel to utilize those auto-injectors to provide emergency medical aid to persons suffering from anaphylactic reaction. (Educ. Code, § 49414, subds. (a), (c), & (d).)

Then in 2002, Assembly Bill No. 481, which would have added section 49423.1 to the Education Code, was passed by the Legislature. (Assem. Bill No. 481 (2001-2002 Reg. Sess.) enrolled Sept. 17, 2002 (A.B. 481).) The statute would have required all public schools to designate and train at least two employees to administer diabetes care, including the administration of insulin, to diabetic students in accordance with instructions set forth by the student's physician, expressly notwithstanding the provisions of the NPA, when a school nurse or other licensed nurse is absent. (A.B. 481, *supra*, § 2.) Governor Davis vetoed the bill on the grounds that (1) "[e]xisting law already provides that any pupil who is required to take prescription medication during the regular school day may be assisted by school personnel if a written statement is obtained from a physician and a written request is made by the pupil's parent/guardian[,]" (2) the bill "would create a costly new state reimbursable mandate . . . [,]" and (3) he was advised "the immunity from liability language may protect neither the school district [n]or school personnel from

liability." (Governor's Veto Message to Assem. on A.B. 481 (Sept. 26, 2002).)

The Legislature's adoption of A.B. 481 is some evidence of the Legislature's understanding of the need for statutory authorization for unlicensed school personnel to administer insulin to diabetic students and of the need for an exception from section 2725 to cover such administration of medications (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 833). However, the Governor's veto message suggests the need for such statutory authorization and exception was not clear and that the Governor believed the legislation was unnecessary. (See *In re Marriage Cases* (2008) 43 Cal.4th 757, 796, fn. 17.)

The Legislature, nevertheless, persisted in its efforts to address diabetic student health care. The following year, Assembly Bill No. 942 was introduced, seeking again to add section 49423.1 to the Education Code to permit unlicensed school personnel, in the absence of a licensed nurse, to administer emergency diabetes care to students. (Assem. Bill No. 942 (2003-2004 Reg. Sess.) introduced on Feb. 20, 2003 (A.B. 942).) But A.B. 942 was soon amended to delete the language broadly authorizing unlicensed school personnel to administer diabetes care. (A.B. 942, *supra,* March 26, 2003.) The bill was amended and ultimately passed to add Education Code section 49414.5 (section 49414.5) instead of Education Code section 49423.1. (Stats. 2003, ch. 684 (A.B. 942), § 1.) Section 49414.5 authorizes unlicensed trained school personnel to

provide emergency administration of glucagon to diabetic students in the limited circumstance where they are suffering from severe hypoglycemia. (§ 49414.5, subds. (a), (b) & (d).) In addition, subdivision (c) of section 49414.5 authorizes diabetic students who are able and have parent or guardian permission to provide diabetes self-care at school and school-related activities.

In 2004, section 49423 was amended into its current format and provision was made for students to carry and self-administer prescription auto-injectable epinephrine if the school district receives the appropriate written statements from the student's physician and parent/guardian. (Stats. 2004, ch. 846 (S.B. 1912, § 1.)

Also in 2004, Education Code section 49423.1 was enacted with language allowing a student's taking of inhaled asthma medication essentially parallel to the language of section 49423. (Stats. 2004, ch. 832 (A.B. 2132) § 1.)

Considering these actions, we hesitate to draw much from the largely unsuccessful legislative efforts to specifically authorize diabetic students to receive insulin at school other than from licensed nurses. "'Settled principles of statutory construction generally prevent deducing the intent behind one act of [the Legislature] from implications of a second act passed years later. [Citation.]' [Citation.] Moreover, 'California courts have frequently noted . . . the very limited guidance that can generally be drawn from the fact that the Legislature has not enacted a particular proposed amendment to

an existing statutory scheme. [Citation.] . . . "The unpassed bills of later legislative sessions evoke conflicting inferences. Some legislators might propose them to replace an existing prohibition; others to clarify an existing permission. A third group of legislators might oppose them to preserve an existing prohibition, and a fourth because there was no need to clarify an existing permission. The light shed by such unadopted proposals is too dim to pierce statutory obscurities. As evidence of legislative intent they have little value. [Citations.]"' [Citation.]" (*Bell v. Department of Motor Vehicles* (1992) 11 Cal.App.4th 304, 313-314; accord, *Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 922-923.)

However, when viewed as a whole, the Legislature's affirmative enactments do suggest the Legislature has seen fit to authorize the administration of only a limited number of medications in limited situations to students by unlicensed school personnel. This suggests the Legislature believes express statutory authorization is necessary in light of the NPA.

We conclude section 49423 does not authorize unlicensed school personnel to administer the insulin injections that diabetic students may require pursuant to a Section 504 Plan or IEP. Whatever may be thought of the wisdom, expediency, or policy of a statute, we have no power to rewrite the statute to make it conform to a presumed intention that is unexpressed.

(*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585; *County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 446.)

II.

Federal Law Does Not Preempt California Requirements

Appellants argue we should not interpret the California statutes to prohibit unlicensed school personnel from administering insulin injections that diabetic students may require pursuant to a Section 504 Plan or IEP, as we have, because California law, so interpreted, would be preempted by federal law on the ground the California law "frustrates the full effectiveness of federal law." (*Perez v. Campbell* (1971) 402 U.S. 637, 652 [29 L.Ed.2d 233, 244]; see *Hines v. Davidowitz* (1941) 312 U.S. 52, 67 [85 L.Ed. 581, 587] [federal preemption found where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"].)

"Under the supremacy clause of the United States Constitution (art. VI, cl. 2), Congress has the power to preempt state law concerning matters that lie within the authority of Congress. [Citation.] In determining whether federal law preempts state law, a court's task is to discern congressional intent. [Citation.] Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. [Citation.] Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to

supplement federal law [citation]; (ii) when compliance with both federal and state regulations is an impossibility [citation]; or (iii) when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.]" (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955 (*Bronco Wine*); accord *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 814.) Appellants claim the last form of federal preemption.

"The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. [Citation.] An important corollary of this rule, often noted and applied by the United States Supreme Court, is that '*[w]hen Congress legislates in a field traditionally occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."*' [Citations.]" (*Bronco Wine, supra,* 33 Cal.4th at pp. 956-957.) "[T]his venerable presumption 'provides assurance that "the federal-state balance," . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts.' [Citations.]" (*Id.* at p. 957.)

California's legislative choice to protect the health and safety of the state's children who suffer from diabetes by limiting the administration of insulin injections at school to licensed individuals or expressly authorized individuals is an exercise of the State's traditional police power that triggers the presumption against preemption. (*Medtronic, Inc. v. Lohr*

(1996) 518 U.S. 470, 475 [135 L.Ed.2d 700, 709] [regulation of health and safety is a field traditionally occupied by the States]; accord *Committee of Dental Amalgam Manufacturers & Distributors v. Stratton* (9th Cir. 1996) 92 F.3d 807, 811; *Chemical Specialties Manufacturers Assn., Inc. v. Allenby* (9th Cir. 1992) 958 F.2d 941, 943.)

Moreover, it is important to note that in order to establish conflict preemption, it is not enough to show "the fact that there is '[t]ension between federal and state law[.]'" (*Shroyer v. New Cingular Wireless Services, Inc.* (9th Cir. 2007) 498 F.3d 976, 988 (*Shroyer*).) "The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." (*Rice v. Norman Williams Co.* (1982) 458 U.S. 654, 659 [73 L.Ed.2d 1042, 1049].) Conflict preemption is found "only in '"those situations where conflicts will necessarily arise."'" (*Shroyer, supra,* 498 F.3d at p. 988.)

Appellants argue the record establishes there are a large number of diabetic students in California, that some of those students must take insulin several times a day in order to survive, that such students may require their insulin shots not only while they are at school, but on school field trips or when they are participating in extracurricular school activities, that California has a significant shortage of registered nurses, in particular school nurses, and that California is currently gripped by fiscal crisis. As a result of these facts, appellants contend substantial numbers of students will not

receive their required insulin if unlicensed school personnel are not authorized to administer prescribed insulin injections.

We do not believe the facts submitted by appellant warrant their dramatic conclusion. Appellants have not provided any specific facts showing what number of schools have a diabetic student with a Section 504 Plan or IEP that requires insulin administration during the school day or at school-related activities who are unable to self-administer their medication and who do not have a parent or guardian who elects to administer their insulin or designate another family member or friend to administer the child's insulin. We, therefore, have no idea how many children may actually require the services of a licensed nurse provided by the school district. The fact that there is generally a shortage of registered nurses in California and that there is a particular shortage of school nurses does not establish that a school needing to provide diabetic care to a student pursuant to a Section 504 Plan or IEP plan will be unable to locate and contract for the services of a licensed nurse, including as necessary a licensed vocational nurse, in any particular case. We find it particularly telling that we have not been directed to any data in the record regarding the availability of licensed vocational nurses. Finally, while we can guess that funding of the required services may be difficult for schools in these economic times, we have no evidence that such difficulties cannot be overcome in order to meet the requirements of federal law.

Appellants rely heavily on the case of *Crowder v. Kitagawa,* (9th Cir. 1996) 81 F.3d 1480 (*Crowder*), as illustrating what they suggest is an analogous situation of conflict preemption. We find *Crowder* to be materially distinguishable from the situation present in this case. In *Crowder,* the Ninth Circuit Court of Appeals held the application, without reasonable modifications, of Hawaii's 120-day quarantine requirement for carnivorous animals entering the state to guide dogs needed by visually-impaired individuals effectively prevented such persons from enjoying the benefits of state services and activities in violation of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101, et seq.). (*Crowder, supra,* at p. 1481.) The court reasoned that: "Although Hawaii's quarantine requirement applies equally to all persons entering the state with a dog, its enforcement burdens visually-impaired persons in a manner different and greater than it burdens others. Because of the unique dependence upon guide dogs among many of the visually-impaired, Hawaii's quarantine effectively denies these persons - the plaintiffs in this case - meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others. The quarantine, therefore, discriminates against the plaintiffs by reason of their disability." (*Id.* at p. 1484, fn. omitted.) It acknowledged "the general principle that courts will not second-guess the public health and safety decisions of state legislatures acting within their traditional police powers." (*Id.* at p. 1485.) "However, when Congress has passed

antidiscrimination laws such as the ADA which require reasonable modifications to public health and safety policies, it is incumbent upon the courts to insure that the mandate of federal law is achieved." (*Ibid.*)

In contrast here, appellants have not met their burden to show it is necessary for unlicensed school personnel to administer insulin to diabetic students in order "to insure that the mandate of federal law is achieved." (*Crowder, supra,* 81 F.3d at p. 1485.) A showing that there may be tension or potential conflict between California law and the federal law is not enough. (*Rice v. Norman Williams Co., supra,* 458 U.S. at p. 659 [73 L.Ed.2d at p. 1049]; *Shroyer, supra,* 498 F.3d at p. 988.) California law does not frustrate or stand as an obstacle to the purposes of the federal law in assuring students with disabilities free appropriate public education because schools can comply with both the federal law and the California law.

III.

Conclusion

We do not decide whether unlicensed school personnel can safely administer prescribed insulin to diabetic students who need it or whether it would be sensible to allow them to do so. It is for the Legislature, not the courts, to pass upon the social wisdom of legislation. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 334.) If diabetic students and their parents would be better served by allowing unlicensed, but trained, school personnel to administer insulin

injections when the administration of such injections by a licensed nurse is not feasible, it is up to the Legislature, not the courts, to change the law. (*Ibid.*)

We conclude only that unlicensed school personnel are not authorized by current law to administer prescribed injections of insulin to a diabetic student, even if the student requires such injections pursuant to a Section 504 or IEP plan, absent express statutory permission. Therefore, section 8 of the CDE's Legal advisory that states unlicensed school personnel have such authority is invalid.

DISPOSITION

The judgment and issuance of the peremptory writ of mandate is affirmed. The automatic stay confirmed by this court's order dated April 2, 2009, is vacated upon finality of this opinion. Costs on appeal are awarded to respondents. (Cal. Rules of Court, rule 8.278(a)(1) & (a)(2).)

CANTIL-SAKAUYE, J.

I concur:

SIMS, J.

I concur because I must, not because I want to.

This does not mean that I find any fault with the majority's legal analysis and conclusion. Indeed, their decision is thorough, objective, well-reasoned, legally correct, and well-written. It is just the result, compelled by the Legislature's policy decision and unsuccessful efforts to change the policy, that makes little sense to me.

The American Diabetes Association (ADA) and the California Department of Education (CDE) made a showing in the trial court that (1) thousands of public school students have diabetes and are in need of insulin injections during the school day, (2) there is a severe shortage of school nurses to assist these students by administering insulin injections, (3) properly-trained school personnel who are not nurses can safely inject insulin, and (4) without such assistance, the health of diabetic students will be at risk.

Their position that trained school personnel other than nurses can safely administer insulin injections, and should be authorized to do so when necessary, was also the view of the American Academy of Pediatrics, the American Association of Clinical Endocrinologists, the Pediatric Endocrine Nursing Society, the American Association of Diabetes Educators, and the Juvenile Diabetes Research Foundation.

The American Nursing Association and school nurses organizations disagreed, claiming the health of diabetic public school students will be in jeopardy if trained school personnel other than nurses are permitted to inject insulin--a drug which the nurses assert is dangerous, requires substantial scientific knowledge to safely

administer, and poses a significant risk of harm if administered in error.

Having heard the competing positions and examined information presented in support of each, the trial judge concluded the weight of the evidence supports the position of the ADA and CDE, and they made the most "persuasive public policy argument," for which the judge would have voted if he were a legislator. The judge correctly noted, however, that such a policy decision must be made by the Legislature, not the courts, and that the existing statutory scheme precludes the administration of insulin by trained school personnel other than nurses. In essence, the judge ruled that, even if the scheme is unwise, it cannot be rewritten by courts to achieve a better result.

Like my colleagues, I agree that the trial judge got it right. If there is a flaw in a statutory scheme that does not run afoul of the Constitution, it is up to the Legislature, not the courts, to fix it.

Thus, even though it seems to me that allowing trained school personnel other than nurses to administer insulin injections for diabetic public school students when necessary would be the wiser public policy decision, I must defer to the Legislature's policy judgment and the subsequent legislative and executive decisions preventing a change in that policy--regardless of whether they were the product of legitimate concern for the safety of diabetic public school students or the result of a labor organization protecting its turf and flexing its political muscle.

SCOTLAND, P. J.

EXHIBIT B

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

AMERICAN NURSES ASSOCIATION et al.,
Plaintiffs and Respondents,
v.
JACK O'CONNELL, as Superintendent of Public Instruction, etc., et al.,
Defendants and Appellants;
AMERICAN DIABETES ASSOCIATION,
Intervener and Appellant.

C061150
Sacramento County
No. 07AS04631

BY THE COURT:

Appellant's petition for rehearing is denied.

Dated: June 30, 2010

SCOTLAND, P.J.

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cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: American Nurses Association et al. v. O'Connell et al.
C061150
Sacramento County No. 07AS04631

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PROOF OF SERVICE

American Nurses Association et al. v. O'Connell et al.,
Cal. Sup. Ct. No. _____ (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 July 19, 2010, I served the following document(s) by the method indicated below:

PETITION FOR REVIEW

☒ 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 July 19, 2010, at San Francisco, California.

Myra R. Taylor