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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

K.C., by and through Erica C., her guardian, **A.A.**, by and through Stacey A., her guardian, **M.C.**, by and through Laurie C., her guardian, **K.F.**, by and through Shereé F., her guardian, each one individually and on behalf of all other similarly situated children, and the **AMERICAN DIABETES ASSOCIATION**, an organization,

Plaintiffs,

vs.

JACK O'CONNELL, in his official capacity as Superintendent of Public Schools For the State of California; **RUTH E. GREEN, GLEE JOHNSON, ALAN BERSIN, RUTH BLOOM, YVONNE CHAN, DONALD G. FISHER, KENNETH NOONAN, JOE NUNEZ, BONNIE REISS, and JONATHAN WILLIAMS,** each in his or her official capacity as a member of the Board of Education of the State of California; **THE BOARD OF EDUCATION OF THE STATE OF CALIFORNIA;** the **CALIFORNIA DEPARTMENT OF EDUCATION; ROBERT KESSLER**, in his official capacity as

Case No. C 05-4077 MMC

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: December 9, 2005
Time: 9:00 a.m.
Location: Courtroom 7

Honorable Maxine M. Chesney

Superintendent for San Ramon Valley Unified School District; **JOAN BUCHANAN, NANCY PETSUCH, BILL CLARKSON, PAUL GARDNER and GREG MARVEL,** each in his or her official capacity as a member of the Board of Trustees of the San Ramon Valley Unified School District; the **BOARD OF TRUSTEES OF THE SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT**; the **SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT**; **DOUGLAS GEPHART**, in his official capacity as the Superintendent of the Fremont Unified School District; **PEGGY HERNDON, LARRY SWEENEY, NINA MOORE, GUY EMANUELE, IVY WU,** each in his or her official capacity as a member of the Board of Trustees of the Fremont Unified School District; the **BOARD OF TRUSTEES OF THE FREMONT UNIFIED SCHOOL DISTRICT**; the **FREMONT UNIFIED SCHOOL DISTRICT,**

Defendants.

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NOTICE OF MOTION

NOTICE IS HEREBY GIVEN that on Friday, December 9, 2005, at 9:00 a.m., before the honorable Maxine M. Chesney, in Courtroom 7, located at 450 Golden Gate Avenue, San Francisco, California 94102, or as soon as possible thereafter as this matter may be heard, Plaintiffs will move for a preliminary injunction requiring defendants to provide to plaintiffs the essential assistance and services required of them by the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Individuals with Disabilities Education Act (IDEA), so that the Plaintiffs can receive the free and appropriate education they are entitled to under those Acts. Plaintiffs' motion will be based on this Notice, the Memorandum of Points and Authorities herein, the supporting declarations and proposed order served and filed herewith, all pleadings and papers filed herein, and such other and further evidence and argument as the Court may consider at the hearing on this Motion.

SUMMARY OF RELIEF REQUESTED

Plaintiffs seek to compel defendants to fulfill their legal obligation to provide diabetes care at school to ensure the health and safety of their students. Defendant school districts would be required to prepare and adopt a diabetes assistance plan that would ensure each student with diabetes receives necessary and appropriate assistance while attending school so that the child can manage his or her diabetes according to procedures directed by the child's parents and treating physician. The preliminary injunction would further provide that the California Department of Education would be required to fulfill its obligation to monitor and enforce defendant school districts' compliance with their obligation to provide the required assistance to their diabetic school children. The detailed provisions of the requested preliminary injunction are set forth in full in the [Proposed] Order Granting Plaintiffs' Motion For Preliminary Injunction, served and filed concurrently herewith.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs are children with diabetes who are not receiving adequate monitoring and treatment of their condition so that they can safely attend public school. Plaintiffs bring this action under the

American with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 ("Section 504") and the Individuals with Disabilities Education Act (IDEA). These laws have long established that children with disabilities have a right to a "free, appropriate public education" in the "least restrictive environment." Integral to this mandate is the right to receive those related services that are necessary for a disabled child to benefit from education and to attend school safely. The Supreme Court has declared that there is a broad right to health-related services under the Individuals with Disabilities Education Act, and Section 504 provides the same right to all children with disabilities.

Despite the clear right of plaintiff children to receive necessary health-related services in school, the defendants have put them at risk by refusing to adopt policies and provide services in accordance with treatment plans prescribed by the children's treating physicians. Every day that passes poses an unacceptable health and safety risk to these vulnerable children and means that they are effectively denied the same educational opportunities afforded to their non-disabled classmates.

Until the Court reaches the merits of their claims, plaintiffs must endure a status quo that exposes them to an unacceptable risk of life-threatening and/or debilitating injury, long-term health complications, and serious emotional harm. Those risks can be sharply reduced through provisional relief that imposes a minimal burden on the schools. Indeed, the relief requested in this motion is already being provided in some California public schools that are not parties to this action. When faced with comparably sharp disparities in the balance of hardships, the courts uniformly have granted preliminary relief. The case for preliminary injunctive relief is even stronger here because plaintiffs not only can demonstrate that they have a "fair chance" of success on the merits, they can show an overwhelming likelihood of success.

By the time this Court reaches the merits, it will be unable to undo the harm caused by defendants' refusal to follow plaintiffs' prescribed treatment plans in their schools. Because an ounce of prevention is worth a pound of cure, the Court should order defendants to expend that ounce to provide meaningful assistance to these children until the Court can reach the merits of the substantial questions raised in this case. The Court should therefore order the relief requested in the proposed order submitted with this motion.

II. FACTUAL BACKGROUND

A. Diabetes Is A Common Chronic Disease In School-Aged Children

Diabetes is a non-curable, serious, and chronic disease that prevents the body from properly using food for energy. (Declaration of Francine Kaufman, M.D. ("Kaufman Decl.") at 3) The human body uses glucose (a form of sugar) from food to produce energy. (*Id.*) Insulin, a hormone produced by the pancreas, moves glucose (a form of sugar) from the bloodstream into body cells where the glucose is needed to provide energy. (*Id.*) Without insulin, cells cannot get the energy they need for life and the body literally starves to death. (*Id.*) In people with diabetes, either the pancreas does not make enough insulin or the body cannot use insulin properly. (*Id.*)

There are two main types of diabetes in children, type 1 and type 2. (Kaufman Decl. at 3) Type 1 diabetes (formerly called insulin-dependent diabetes or juvenile diabetes) is an autoimmune disease in which the body destroys insulin-producing beta cells in the pancreas. (*Id.*) As a result, the body produces very little or no insulin. (*Id.*) Type 2 diabetes (formerly called non-insulin dependent diabetes or adult-onset diabetes) results when the body cannot make sufficient amounts of insulin or properly use insulin. (*Id.* at 4) According to the National Institutes of Health, an estimated 850,000 to 1.7 million Americans have type 1 diabetes. (*Id.*) Of those, about 125,000 are children 19 and under. (*Id.*) An additional 30,000 Americans develop type 1 diabetes every year, 13,000 of whom are children. (*Id.*)

Without the ability to produce or properly use insulin, the body's main energy source—glucose—cannot be used as fuel. (Kaufman Decl. at 4) Rather, glucose builds up in the bloodstream, causing severe and possibly fatal consequences. (*Id.*) Thus deprived of energy, a person with type 1 diabetes who does not receive insulin will die within a matter of days; in fact, this is what happened to all people with type 1 diabetes before the first insulin injections became available in 1921. (*Id.*) Children and adults with type 1 diabetes must receive insulin through either multiple daily injections or an insulin pump. (*Id.*) People with type 2 diabetes may be able to control their disease through diet and exercise alone or may require oral medications and/or insulin injections. (*Id.*)

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B. There Is A Significant Link Between Inadequate Management of Blood Glucose Levels And Life-Threatening Health Risks

Even when a person with diabetes gets the insulin he or she needs to survive, he or she still faces the risk of complications. These complications can be delayed or prevented by keeping the patient's blood glucose level on a relatively even keel. (Kaufman Decl. at 4-5) The buildup of glucose in the blood not only deprives the body's cells of energy, it also can damage body systems. (*Id.* at 4) Over many years, high blood glucose levels can cause damage to the eyes, kidneys, nerves, heart, blood vessels and other body systems. (*Id.*) Blood glucose levels that are out of the target range can also cause short term complications, as described below. The primary goal of diabetes management is to keep blood glucose levels as close to target levels as possible to prevent or delay the development of these long-term complications. (*Id.* at 4-5) Measurements of blood glucose levels can be taken using a blood glucose finger-stick test, in which a drop of blood is obtained and placed on a test strip. (*Id.* at 5) The test strip is then read by a blood glucose meter, which measures the blood glucose level. (*Id.*)

In people who do not have diabetes, the body naturally regulates the amount of insulin present in the blood so that the blood glucose level remains almost constant. (Kaufman Decl. at 8) However, a person with diabetes who receives insulin through a syringe or pump cannot naturally regulate the amount of insulin or the amount of glucose in the blood in the same way. (*Id.*) Therefore, people with diabetes who use insulin are subject to both high and low blood glucose levels. (*Id.*)

Low blood glucose (hypoglycemia) is the most common short term health risk for students with diabetes. (Kaufman Decl. at 8) It occurs when the body gets too much insulin, too little food, a delayed meal, or more than the usual amount of exercise. (*Id.*) Symptoms of mild to moderate hypoglycemia include tremors, sweating, light-headedness, irritability, confusion, difficulty concentrating and learning, and drowsiness. (*Id.*) A student with this degree of hypoglycemia will need to ingest carbohydrates promptly and may require immediate assistance from another person. (*Id.*) Severe hypoglycemia, which can develop if more moderate hypoglycemia is not promptly and effectively treated, may lead to unconsciousness and convulsions and can be life-threatening if not treated promptly. (*Id.*)

If severe hypoglycemia causes seizures or loss of consciousness, it is a medical emergency and must be immediately treated to prevent brain damage or death. (Kaufman Decl. at 9) Such a person will be unable to swallow and thus cannot take in glucose through food or liquids. (*Id.*) The proper treatment in this circumstance is to immediately administer an injection of glucagon and to call 911. (*Id.*) Because of the life-threatening nature of severe hypoglycemia, any delay in administering glucagon puts the student's health at unnecessary risk. (*Id.*)

High blood glucose (hyperglycemia) is another complication of diabetes in children. (Kaufman Decl. at 9) Hyperglycemia occurs when the body gets too little insulin, too much food, or too little exercise. (*Id.*) It may also be caused by stress or an illness such as a cold. (*Id.* at 9-10) The most common symptoms of hyperglycemia are thirst, frequent urination, and blurry vision. (*Id.* at 10) Even mild hyperglycemia, as well as hypoglycemia, can cause a child to have difficulty concentrating and learning because of the effect that glucose levels can have on brain functioning and cognitive ability. (*Id.*) In addition, if untreated over a period of time (usually several days but sometimes as little as a few hours), hyperglycemia can cause a serious condition called diabetic ketoacidosis (DKA), which is characterized by nausea, vomiting, and a high level of ketones in the blood and urine. (*Id.*) Like hypoglycemia, DKA is a medical emergency and can result in death if not properly treated. (*Id.*) Normally DKA will not occur if blood glucose levels are regularly monitored and milder forms of hyperglycemia are treated, since DKA is preceded by a period of higher-than-normal blood glucose levels. (*Id.*)

C. Tight Control Of Blood Glucose Levels Through Monitoring And Remedial Action Significantly Lowers The Risk Of Long-term Complications

The key to preventing the potentially severe consequences of hypoglycemia and hyperglycemia is knowing the child's blood glucose level and taking appropriate action.[1] (Kaufman Decl. at 10) For that reason, monitoring the child's blood glucose level throughout the school day is

[1] The Diabetes Control and Complications Trial, a large-scale, rigorous and groundbreaking study of long-term diabetes care, showed a significant link between blood glucose control and the later development of diabetes complications, with improved glycemic control decreasing the risk of these complications. (Kaufman Decl. at 5)

crucial for most students with diabetes. (*Id.*) The American Diabetes Association and the diabetes medical community recommend self-monitoring of blood glucose for all individuals who are capable of this, including children. (*Id.*) Many children, particularly older children, regularly manage their disease and are able to check their blood glucose levels, administer insulin and perform other routine diabetes care tasks without assistance or supervision. (*Id.*) However, other children may need supervision in performing diabetes care tasks such as blood glucose monitoring, and some may not be able to perform these tasks at all without assistance. (*Id.*) Many of the children needing assistance are young, but even older children may require assistance or supervision, particularly if their cognitive abilities or maturity level make self-management inappropriate. (*Id.*) Also, all children with diabetes require assistance with diabetes care in emergency situations (for example, when experiencing severe hypoglycemia and needing administration of glucagon). (*Id.* at 10-11)

It is best for a student with diabetes to obtain a blood glucose level and to respond to the results as quickly and conveniently as possible. (Kaufman Decl. at 11) This is important to avoid exacerbating medical problems through delay in testing/treatment and to minimize educational problems caused by missing instruction in the classroom. (*Id.*) The more quickly a student (or an adult providing assistance to a student) can learn the blood glucose level and implement the response called for in the student's individualized health care plan, the more quickly the student can return to normal and active participation in the learning process. (*Id.*)

D. Plaintiffs Must Carefully Balance Food, Medications And Activity Levels To Keep Their Blood Glucose Levels As Close To Normal As Possible

Plaintiff A.A. is five years old. (Declaration of Stacey A. ("Stacey A. Decl.") at 2) She was diagnosed with type 1 diabetes when she was two years old. (*Id.*) She requires daily insulin injections and blood glucose monitoring to prevent hypoglycemia or hyperglycemia. (*Id.* at 3; Declaration of Suruchi Bhatia, M.D. ("Bhatia Decl."), Exh. C) Depending on her blood glucose level, A.A. may need to eat to raise her blood glucose, or administer more insulin to lower her blood glucose. (Stacey A. Decl. at 3, 7; Bhatia Decl., Exh. C) If her blood glucose becomes too low, A.A. turns very pale and gets dark circles under her eyes, she complains of hunger, and she becomes irritable, sleepy and limp. (Stacey A. Decl. at 7) Left untreated, low blood glucose may result in seizures, coma or death. (*Id.*) Twice, A.A. required glucagon injections because her blood glucose became dangerously low. (*Id.* at 3) If A.A.'s blood glucose becomes too high, she becomes tired, irritable, irrational, hungry, thirsty and cannot focus on learning. (*Id.* at 7) High blood glucose also interferes with A.A.'s ability to learn. (*Id.*)

Plaintiff K.F. is seven years old. (Declaration of Sheree F. ("Sheree F. Decl.") at 2) She was diagnosed with type 1 diabetes when she was five years old. (*Id.*) She requires daily insulin injections and blood glucose monitoring to prevent hypoglycemia or hyperglycemia. (*Id.* at 3) Depending on her blood glucose level, K.F. may need to eat to raise her blood glucose, or may need insulin to lower her blood glucose. (*Id.* at 3, 4, 6, 13) When her blood glucose becomes too low, K.F. cannot learn and faces serious long-term health risks. (*Id.* at 13) When K.F.'s blood glucose becomes too high, she complains of nausea, headache, blurred vision, and stomach ache. (*Id.*) High blood glucose also interferes with K.F.'s ability to learn. (*Id.*)

Plaintiff K.C. is eleven years old. (Declaration of Erica C. ("Erica C. Decl.") at 2) She was diagnosed with type 1 diabetes at eight years of age. (*Id.* at 3) K.C. requires daily insulin injections and blood glucose monitoring to prevent hypoglycemia or hyperglycemia. (*Id.* at 3-4; Bhatia Decl., Exh. B) Depending on her blood glucose level, K.C. may need to eat to raise her blood glucose, or may need insulin to lower her blood glucose. (Erica C. Decl. at 3, 4, 8, 10; Bhatia Decl., Exh. B) When her blood glucose is too low, K.C. becomes physically tired, overwhelmed and irritable. (Erica C. Decl. at 10) High blood glucose levels cause K.C. to have difficulty focusing, blurred vision and a reduced ability to concentrate. (Erica C. Decl. at 7; Bhatia Decl., Exh. B) K.C. also has bi-polar disorder, dyslexia and other learning disabilities. (Erica C. Decl. at 3) Though K.C. is able to assist in her diabetes management, she requires adult supervision to interpret her blood glucose readings and administer insulin. (Erica C. Decl. at 5; Bhatia Decl., Exh. B)

Plaintiff M.C. is five years old. (Declaration of Laurie C. ("Laurie C. Decl.") at 2) She was diagnosed with type 1 diabetes when she was thirteen months old. (*Id.*) She requires daily insulin injections and blood glucose monitoring to prevent hypoglycemia or hyperglycemia. (Laurie C. Decl. at 3; Bhatia Decl., Exh. D) Depending on her blood glucose level, M.C. may need to eat to raise her blood glucose, or may need insulin to lower her blood glucose. (Laurie C. Decl. at 3, 6;

Bhatia Decl. Exh. D) If her blood glucose become too low, M.C.'s complexion becomes very pale and she gets dark circles under her eyes, she complains of hunger and she is irritable, sleepy and limp. (Laurie C. Decl. at 6) If M.C.'s blood glucose becomes too high, she becomes tired, irritable, irrational, hungry, thirsty and cannot focus on learning. (*Id.*)

All plaintiffs require the assistance of school personnel in performing diabetes care tasks, including insulin and glucagon administration and blood glucose monitoring. They are either too young to perform the tasks alone or need assistance due to limitations resulting from other disabling conditions. (*See e.g.,* Stacey A. Decl. at 2; Laurie C. Decl. at 2; Erica C. Decl. at 2-3; Bhatia Decl. Exhs. B-D).

E. Plaintiffs Are Students In The San Ramon Valley And Fremont Unified School Districts; Defendant Districts Have Refused To Provide Needed Diabetes Care

Plaintiffs require the assistance of school personnel in performing some diabetes care tasks, including insulin and glucagon administration and blood glucose monitoring. However, the San Ramon Valley and Fremont Unified School Districts have refused to provide trained personnel to give this assistance. (See Laurie C. Decl. at 5; Erica C. Decl. at 5-9; Stacey A. Decl. at 4, 6; Sheree F. Decl. at 4-7, 9-13; Declaration of Anna E. Sandstrom, M.D. ("Sandstrom Decl.") at 4-5) Indeed, defendant San Ramon Valley Unified School District has adopted formal policies prohibiting school personnel from injecting insulin. (Complaint Exh. A, attached as Exh. A to Declaration of Kurtis J. Kearl ("Kearl Decl.")). And both defendant districts have failed to require school personnel to provide even the most basic diabetes care—which requires very minimal training—such as watching for signs and symptoms of hyperglycemia and hypoglycemia and monitoring food intake. (See Laurie C. Decl. at 5; Erica C. Decl. at 5-9; Stacey A. Decl. at 4, 6; Sheree F. Decl. at 4-7, 9-13; Sandstrom Decl. at 4-5)

Plaintiff K.F. has been a student in the Fremont Unified School District since 2004. (Sheree F. Decl. at 3) Though the district has had a year to implement a reasonable diabetes care plan for K.F., it has not done so. (*Id.* at 5) The district has failed to consistently monitor K.F.'s blood glucose level. (*Id.*) It has refused to administer insulin or glucagon. (*Id.*) And it has refused to provide diabetes care during field trips. (*Id.* at 8) Shortly after the start of this school year, K.F. told her teacher that she felt "shaky" and needed to test her blood glucose levels. (*Id.* at 10) Her teacher refused to allow this. (*Id.*) Later that day, K.F.'s science teacher sent her to the office (accompanied by another child) to test her blood glucose because she appeared "shaky." (*Id.*) Her blood glucose level was dangerously low. (*Id.*) K.F. has missed school due to the district's failure to implement her diabetes care plan. (*Id.* at 12) On the days she attends, her parents must bridge the gap in care and travel to the school whenever she needs insulin. (*Id.* at 6, 12) K.F. feels "punished" because of the way the district treats her as a result of her disability. (*Id.* at 13) K.F. told her mother she is afraid of going into a coma and not getting help from her teacher. (*Id.* at 10) Twice, K.F. told her mother that she wanted to kill herself. (Sandstrom Decl. at 4) She also stated that she hates school because her teachers do not recognize her need to have snacks and take bathroom breaks as a result of her diabetes. (*Id.* at 4) Although the district developed a 504 plan for K.F. for the first time this school year, the plan fails to fully address her diabetes care needs. Thus, the district has put K.F. at serious risk of harm. (*Id.* at 13)

Plaintiff K.C. is a fifth grade student in the San Ramon Valley Unified School District. (Erica C. Decl. at 2, 5) In 2000, the district determined that K.C. is eligible for special education and related services due to another disabling condition and she has had an Individualized Education Program (IEP) since then. (*Id.* at 3) However, the San Ramon defendant has refused to include diabetes care in her IEP. (*Id.* at 5) Though Erica C. provided defendant district a diabetes care plan based on doctor's orders, it has consistently failed to carry out the prescribed regimen. (*Id.* at 6) The San Ramon Valley district has refused to monitor K.C.'s food intake and blood glucose, refused to supervise K.C.'s use of her insulin pump, refused to administer insulin, and failed to take steps to ensure emergency care during a disaster. (*Id.* at 5-9) Instead, the San Ramon defendant has insisted that K.C.—a child with bi-polar disorder and dyslexia—manage her own diabetes. (*Id.* at 7) Since K.C. cannot safely attend school without assurances that her blood glucose will be monitored, her mother has had to forego employment and travel to the school on a daily basis to provide this care when needed. (*Id.* at 8) Still, K.C. experiences high and low blood glucose levels regularly and this is having a dramatic impact on her ability to learn. (*Id.* at 10) K.C. is behind her grade level and has missed opportunities to learn as a result of poor management of her diabetes at school. (*Id.* at 10)

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She is often physically tired, overwhelmed, irritable, and unable to concentrate on her school work because of inadequate diabetes management. (*Id.* at 10)

Plaintiffs M.C. and A.A. are kindergarten students in the San Ramon Valley Unified School District. (Laurie C. Decl. at 4; Stacey A. Decl. at 3) Though Laurie C. (M.C.'s mother) and Stacey A. (A.A.'s mother) provided school officials complete physician-prescribed diabetes management regimens, the district has not implemented adequate diabetes care policies for M.C. and A.A. (Laurie C. Decl. at 5; Stacey A. Decl. at 5-6) When Laurie C. requested a 504 plan and/or an Individualized Education Program, the district stated "the school does not do IEPs under such circumstances."[2] (Laurie C. Decl. at 5:2) To date, there are no 504 plans or IEPs in place and no other plan formally identifying school staff members responsible for providing diabetes care. (Laurie C. Decl. at 5; Stacey A. Decl. at 6) Nor is there any plan in place to ensure emergency care of M.C. and A.A. in the event of disaster. (Laurie C. Decl. at 5; Stacey A. Decl. at 6) The school nurse—who floats between five schools—has stated that the school will not permit school personnel to administer insulin. (Laurie C. Decl. at 4-5; Stacey A. Decl. at 5-6) Because there is no on-site adult available to render this care, there is no meaningful assurance that M.C. and A.A. will receive insulin injections that may be necessary to prevent serious short- and long-term health risks. (Laurie C. Decl. at 4-5; Stacey A. Decl. at 5-6)

F. Non-Medical Personnel Can Be And Are Routinely Trained To Monitor Diabetes And Administer Diabetes Medications

Defendants' refusal to provide diabetes care is not medically justified. Non-medical personnel can be and routinely are trained to monitor diabetes and administer diabetes medications, including insulin and glucagon. (Kaufman Decl. at 9, 13, 14:28-15:2 ("Experience has shown that non-medical personnel can be trained easily and in a relatively short period of time to perform

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[2] A 504 plan is developed and implemented by school districts in conjunction with parents for 504-eligible students who require regular *or* special education and related aids and services to ensure a free, appropriate public education. *See* Rehabilitation Act implementing regulations, 34 C.F.R § 104.33. Similarly, an Individualized Education Program is a document required to be developed and implemented by school districts in conjunction with parents for students covered under the Individuals with Disabilities Education Act who require special education and related services to ensure a free, appropriate public education. *See*, 20 U.S.C. §§ 1401(9) and 1414(d). Both types of plans must specify health-related services for eligible students with diabetes, including fully developed diabetes management regimens when necessary to ensure a free, appropriate public education. See *infra* at 18-20.

needed diabetes care tasks, and in my experience non-medical personnel are routinely trained to do so."))

In the Albany School District, for example, the "philosophy is that the needs of the child come first and they are willing to do what is necessary." (Declaration of Barbara W. at 4:6-7) The District has trained non-medical personnel in diabetes management and treatment. (*Id.* at 4) The District specifically designates non-medical personnel to aid children with diabetes, and administer glucagon and insulin as needed. (*Id.* at 5:21-26 ("All school staff who are regularly in proximity to my son are aware that he has diabetes and are trained at a basic level to observe his behavior for signs and symptoms of diabetes complications. Several of those staff are trained and designated to carry out his specific diabetes regimen, including insulin and glucagon administration, to ensure that he is properly supervised and promptly assisted by on-site personnel as needed throughout the day.")). Other districts have also taken the necessary steps to protect students with diabetes. (See Declaration of James S. at 7:12-14 ("Each year several people at my child's school have been trained to monitor his blood glucose level, to treat hypoglycemia (low blood glucose), to include glucagon administration, and to assist him with administering insulin with his pump."))

Unlike these model districts, defendant school districts have refused to train non-medical personnel to monitor and manage the blood glucose levels of their students with diabetes. (See Laurie C. Decl. at 5; Erica C. Decl. at 5-9; Stacey A. Decl. at 4, 6; Sheree F. Decl. at 4-7, 9-13; Sandstrom Decl. at 4-5). Thus, plaintiffs cannot safely attend school unless their parents or other non-school personnel bridge the gap in care. (Sandstrom Decl. at 5:12-15 ("It is my opinion to a reasonable degree of medical certainty that K.F. cannot safely attend school without assurances that her blood glucose will be tested, that she will be given sufficient opportunities to eat and that her food intake will be monitored, and that she will be given insulin and/or glucagon to treat her diabetes as necessary"); Kaufman Decl. at 16:8-10 ("Providing appropriate and adequate care to children with diabetes while at school is critical for their health and safety. Failing to provide this level of care unnecessarily puts students with diabetes at risk.").

The U.S. Department of Health and Human Services' National Diabetes Education Program (NDEP), jointly sponsored by the National Institutes of Health and the Centers for Disease Control and Prevention, has established a Diabetes in Schools Initiative. The purpose of the initiative is to educate school personnel about the benefits of optimal diabetes management and to help ensure a supportive environment and equal access to educational opportunities for students with diabetes. Working with experts in diabetes, pediatric medicine, school nursing, and education and the U.S. Department of Education, the NDEP has produced Helping the Student with Diabetes Succeed: A Guide for School Personnel to address the needs of all students with diabetes. (Request for Judicial Notice, Exh. A) In an April 2005 letter to all chief state school officers, the U.S. Department of Education explicitly recommended the guide to be distributed to all public schools. (Request for Judicial Notice, Exh. __).

The guide provides school administrators and health services personnel a comprehensive resource that lays out a team approach to diabetes management in the school setting, provides a basic primer and glossary about diabetes, reviews components for planning and implementing effective diabetes management, including by training and designating non-medical personnel to administer insulin and glucagon, contains sample action plans that alert school personnel to common signs and symptoms of high and low blood glucose levels and how to handle emergencies, and reviews the federal laws pertaining to schools' responsibilities to educate students with disabilities. (*Id.*)

G. The California Department Of Education Has Refused To Implement Policies And Procedures For The Protection Of Students With Diabetes And Has Refused To Investigate Compliance Complaints On Behalf Of Plaintiffs

On November 2, 2004, the Disability Rights Education & Defense Fund ("DREDF"), on behalf of students with diabetes attending the San Ramon Valley Unified School District, filed a compliance complaint with CDE requesting (a) a state directive by CDE to the district which sets forth its obligation to administer insulin to children with diabetes in district schools so that the parents and children are not left to the unlawful policy/practice of the school district; (b) that CDE require corrective action bringing the districts in compliance with applicable laws such as the IDEA and Section 504; (c) that CDE clarify that school districts are responsible for administering insulin in accordance with a child's Diabetes Medical Management Plan developed in conjunction with the family and the child's doctor, when necessary while the child is at school; and (d) that CDE clarify that there is no legal prohibition against the administration of insulin by properly trained and supervised non-medical personnel. (Complaint Exh. A, attached as Exh. A to Kearl Decl.) DREDF submitted evidence of the district's unlawful prohibition on the administration of insulin by enclosing with the complaint two San Ramon Valley Unified School District forms used to designate persons authorized to administer insulin to students during school hours. (*Id.*) Both forms contain explicit prohibitions on the administration of insulin by District employees. (*Id.*)

In a letter dated February 25, 2005, CDE summarily dismissed the unlawful discrimination allegations in DREDF's November 2, 2004 compliance complaint, on the grounds that DREDF "failed to identify a specific student that was allegedly harmed as a result of the District[']s policies regarding the administration of insulin." (Complaint Exh. B, attached as Exh. B to Kearl Decl.) The CDE's response did not address the allegations of violations of the IDEA and it was not provided within the 60-day timeframe required under governing state and federal regulations. (*Id.*) Nevertheless, CDE indicated that if it had evaluated San Ramon Valley Unified School District policies, it would probably have found them to be acceptable. (*Id.*)

On March 22, 2005, DREDF, again on behalf of students with diabetes attending the San Ramon Valley Unified School District, filed a compliance complaint with CDE identifying three affected students by name and requesting the same relief specified in the prior complaint. (Complaint Exh. C, attached as Exh. C to Kearl Decl.) By letter dated May 20, 2005, CDE again summarily dismissed the unlawful discrimination allegations in DREDF's March 22, 2005 compliance complaint without any inquiry or investigation on the grounds that it "fail[ed] to specifically identify the actual acts of discrimination that resulted in the loss of educational benefits to the three individuals named." (Complaint Exh. D, attached as Exh. D to Kearl Decl.) The CDE's response did not address the allegations of violations of the IDEA. (*Id.*)

Thus, CDE has failed to ensure that all children with diabetes who reside in California receive a free, appropriate public education by failing to: (a) adequately monitor compliance with federal laws and regulations related to the education of children with diabetes; (b) adequately investigate complaints regarding school districts' noncompliance with these laws; and, (c) require districts to comply with federal laws and regulations designed to protect children with diabetes.

As a result, parents of children with diabetes are being forced to remove their children from their home school districts and transfer them to other schools. (See Declaration of Lynn T. at 6-7 (describing Walnut Creek Unified School District's refusal to accommodate her child with diabetes and her decision to transfer her child to another school district)). In some cases, parents are being forced to bear the expense of private school tuition because public schools have refused to live up to their obligations under federal law. (See Declaration of Tiffany D. at 8-9 (describing San Juan Unified School District's refusal to implement an adequate care plan for her child with diabetes and her decision to transfer her son to private school)).

II. LEGAL ARGUMENT

A court may grant a preliminary injunction if either (1) the plaintiffs are likely to succeed on the merits of their claims and they would suffer irreparable injury if preliminary injunctive relief were denied, or (2) there are serious questions going to the merits and the balance of hardships tips in plaintiffs' favor. *See Foti v. City of Menlo Park*, 146 F. 3d 629, 634 (9th Cir. 1998); *Alvarez v. Fountainhead, Inc.*, 55 F. Supp. 2d 1048, 1050 (N.D. Cal. 1999) (granting preliminary injunction requiring school to train staff members in asthma care); *Sullivan v. Vallejo City Unified School Dist.*, 731 F. Supp. 947, 962 (E.D. Cal. 1990) (granting preliminary injunction allowing child to bring service dog to school). As shown below, plaintiffs are entitled to preliminary injunctive relief under both formulations.

A. The Balance Of Hardships Tips Decidedly In Plaintiffs' Favor

This Court has recognized that preliminary injunctive relief is needed in cases where disabled students will suffer irreparable harm as a result of discriminatory policies or practices. *See Alvarez v. Fountainhead, Inc.*, 55 F.Supp.2d 1048, 1050-51 (N.D. Cal. 1999) (irreparable harm requirement satisfied where defendant school refused to assist asthmatic child who required assistance with inhalation medicine); *Chapman v. CA Dept. of Education*, 229 F.Supp.2d 981, 989-90 (N.D. Cal. 2002), *rev'd in part and remanded on other grounds sub nom Smiley v. CA Dept. of Education,* 45 Fed. Appx. 780 (9th Cir. 2002), (granting preliminary injunctive relief to plaintiff class of learning disabled students where administration of the California High School Exit Exam threatened to violate specific statutory rights of learning disabled students).

Here, plaintiffs will suffer irreparable harm if preliminary relief is not granted. The absence of adequate diabetes management policies in the defendant schools puts the children at risk of severe long-term health complications. *See supra* at 4-6. It also risks severe emotional damage to these young children. *Id.* at 9:1-6. Moreover, the status quo is a tragedy waiting to happen. As discussed above, there are no formal procedures to prevent plaintiffs' conditions from deteriorating to the point where a grave medical emergency results. *Id.* at 8-13. Indeed, the refusal of districts to provide for insulin administration and other needed services makes it *more* likely that such an emergency will develop. *Id.* at 4-5. And if such an emergency results, the child's life and long-term health will depend entirely on the effectiveness of the ad hoc emergency response because defendant schools have refused to develop and implement physician-prescribed diabetes management plans. *Id.* at 8-10.

These short- and long-term physical and emotional risks to the plaintiffs far outweigh the minimal burden that defendants would incur if the Court ordered them to adequately monitor and treat students with diabetes. Non-medical personnel routinely are trained to administer insulin and glucagon. *See supra* at 10-12. The ease with which individuals can be trained to perform blood glucose monitoring and insulin administration is apparent from the fact that many children, particularly older children, are experienced in managing their diabetes and are able to check their blood glucose levels, administer insulin and perform other routine diabetes care tasks without assistance or supervision. *Id.* at 6. It is also apparent from the fact that the children's parents and other caregivers perform these functions outside of school hours for children that are too young or are otherwise unable to manage their diabetes care alone. This belies any notion that insulin and glucagon administration is dangerous or burdensome. *Id.* at 10-11.

Because the balance of hardships tips overwhelmingly in plaintiffs' favor, preliminary relief is appropriate. Moreover, as we now show, plaintiffs also easily satisfy the requirement that they show a fair chance of success on the merits. In fact, they have a clear likelihood of success.

B. Plaintiffs Will Prevail On The Merits Under The Americans With Disabilities Act, Section 504 Of The Rehabilitation Act And The Individuals With Disabilities Education Act

Rehabilitation Act implementing regulations and the IDEA require states and local educational agencies receiving federal funds to make a "free, appropriate public education" available to children with disabilities. 34 C.F.R. § 104.33; 20 U.S.C. §§ 1400(d), 1414(d). The United States Supreme Court and numerous lower courts have interpreted Rehabilitation Act education regulations and IDEA regulations to be consistent, if not identical. *Smith v. Robinson*, 468 U.S. 992, 1017-1018, fn. 20 (1984), superceded in part on other grounds by section 3 of Pub.L. No. 99-372, 100 Stat. 796. *See also, e.g., Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 253 (3rd Cir. 1999)("There are few differences, if any, between IDEA's affirmative duty and § 504's negative prohibition"); *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir.1995)); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 125 (1st Cir. 2003).

A free, appropriate public education includes the right to receive related services, which include the school health services requested here. The Supreme Court has twice recognized that disabled children have the right to receive services which allow them to safely attend school. *See* discussion *infra* at 19. As fully discussed below, plaintiffs here are being denied a "free, appropriate public education."[3] The San Ramon Valley and Fremont Unified School districts have refused to provide plaintiffs all necessary diabetes care in accordance with physician-prescribed treatment plans, and have refused to develop adequate Section 504 plans or IEPs for students with diabetes. *See supra* at 8-1`0. As a result, those districts (and the California Department of Education which has refused to correct these deficiencies) have put the safety of plaintiffs at risk and have undermined plaintiffs' long-term well being and educational opportunties. Plaintiffs will succeed on the merits of their claims because defendants' conduct plainly violates the ADA, Section 504 and the IDEA.

1. Plaintiffs Are Protected Under The ADA, Section 504 And The IDEA

The ADA and Section 504 prohibit discrimination on the basis of disability. *Lovell v. Chandler*, 303 F. 3d 1039, 1052 (9th Cir. 2002). The ADA defines "disability" as "[a] physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such impairment; or (c) being regarded as having such an impairment."

[3] While the rights to a free, appropriate public education are the same under the ADA, Section 504 and the IDEA, as discussed below, all three statutes are invoked here because the standards regarding eligibility are different under the IDEA

42 U.S.C. § 12102(2). Congress drew the ADA's definition of disability almost verbatim from the definition of "handicapped individual" in the Rehabilitation Act. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 193-94 (1999); *see also* 34 C.F.R. § 104.3(j) (Rehabilitation Act education regulations).

Courts, including the Ninth Circuit, have found individuals with diabetes to be substantially limited in the major life activities of eating, self-care, learning and thinking, among others. *See, e.g., Fraser v. Goodale*, 342 F. 3d 1032, 1041 (9th Cir. 2003) (reversing grant of summary judgment to defendant on whether plaintiff was substantially limited in major life activity of eating); *Lawson v. CSX Transportation,* 245 F. 3d 916, 926 (7th Cir. 2001); *Nawrot v. CPC Int'l,* 277 F. 3d 896, 905 (7th Cir. 2002). *See supra* at 6-8 (describing the burdens and limitations placed on plaintiffs by their treatment regimens). The U.S. Department of Education's Office for Civil Rights has also noted that students are even more likely to be substantially limited by conditions like diabetes because plaintiffs' very access to the measures needed to sustain life and health are in the complete control of defendants when plaintiffs are at school or school-related activities, and thus plaintiffs cannot be viewed as having access to diabetes care that defendants deny them. *See Sutton* Investigative Guidance: Consideration of "Mitigating Measures" in OCR Disability Cases, U.S. Department of Education Office for Civil Rights (September 29, 2000).[4] In addition, diabetes substantially limits plaintiffs' ability to learn because of recurrent high and low blood glucose levels. *See supra* at 4-5 (describing difficulties in concentrating and learning experienced by plaintiffs when blood glucose levels are too high or too low).

A child with diabetes is also eligible for services under IDEA in the "other health impaired" category if the condition adversely affects academic performance and he or she needs special education *and* related services in order to benefit from an education. 20 U.S.C. §1401(3)(A); 34 C.F.R. § 300.7(c)(9)(i). Governing federal regulations state that "other health impairment" means "having limited strength, vitality or alertness, due to chronic or acute health problems such as [...] diabetes that adversely affects a child's educational performance." *Id.* Thus, a child with diabetes

[4] Available at http://www.diabetes.org/uedocuments/Sutton_Investigative_Guidance.pdf.

who frequently experiences hypoglycemia or hyperglycemia that significantly affects his or her ability to concentrate at school, which in turn adversely affects educational performance, is eligible for special education and related services under the IDEA. *See e.g., Conejo Valley Unified Sch. Dist.*, Complaint No. 09-93-1002 (Oct. 27, 1993), 20 IDELR 1276 (rejecting district's blanket refusal to provide services to students with diabetes and describing injections of medicine as a required related aid or service). Moreover, students who are eligible for protection under the IDEA because of other disabling conditions may also have diabetes.

Because plaintiffs are disabled and entitled to protection under the ADA, Section 504, and the IDEA, defendant districts have an affirmative obligation to provide a free, appropriate public education and related services, which includes health services, as further discussed below.

2. Defendants Have Violated The ADA, Section 504 And The Individuals With Disabilities Education Act By Failing To Provide Plaintiffs A Free, Appropriate Public Education

Defendants have failed to provide plaintiffs the "free, appropriate public education" to which they are legally entitled under the IDEA and Section 504. As discussed above, under the IDEA, 20 U.S.C. § 1400 *et seq.*, school districts are required to provide a free, appropriate public education to qualifying students with diabetes, including specially designed instruction and related services which are necessary for special education students to benefit from an education. Regulations implementing the Rehabilitation act in the education context impose the same requirement. 34 C.F.R. § 104.33(a). Under the ADA and Section 504, students with diabetes are protected against unlawful discrimination based on disability and are also entitled to a free, appropriate public education. The free, appropriate public education requirements set forth in Section 504 education regulations "generally conform" to the standards established under the IDEA and govern compliance with ADA as well. 34 C.F.R. Pt. 104, App. A, Subpart D; 42 U.S.C. § 12133; 28 C.F.R. § 35.171(a)(3)(i), 28 C.F.R. § 35.103(a).

As discussed above, in *Smith v. Robinson*, *supra*, 468 U.S. at 1017-1018 n. 20, the United States Supreme Court noted:

> Regulations under § 504 and the EHA [predecessor to IDEA] were being formulated at the same time.... The Secretary of HEW and the Commissioner of Education emphasized the coordination of effort

> behind the two sets of regulations and the Department's intent that the § 504 regulations be consistent with the requirements of the EHA.

See also, *Urban v. Jefferson Cty. Sch. Dist. R-1,* 89 F. 3d 720, 728 (10th Cir. 1996) (citing *Smith*, "regulations promulgated under [Section 504] generally conform to the standards established by the Individuals with Disabilities Education Act "); *Rogers v. Bennett*, 873 F.2d 1387 at 1396 (11th Cir. 1989).

The definition of "related services" broadly encompasses those supportive services that "may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). The Supreme Court has held that, as a general matter, services that enable a disabled child to remain in school during the day provide the student with "the meaningful access to education that Congress envisioned." *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984) ("'Congress sought primarily to make public education available to handicapped children' and 'to make such access meaningful'") (quoting *Board of Ed. Of Hendrick Hudson Central Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 192 (1982)).

Thus, for example, school districts must provide health-related services that are necessary to ensure disabled students are integrated into the public schools. *See Tatro*, *supra*, 468 U.S. at 891 (1984) (school required to provide eight year old child born with spina bifida clean intermittent catheterization; school nursing services must be provided if they can be performed by a nurse or other qualified person, not if they must be performed by a physician); *Cedar Rapids Comty. Sch. Dist. v. Garret F.,* 526 U.S. 66, 73 (1999) (school required to provide continuous one-to-one health-related services to ventilator-dependent student; services were necessary to ensure a free, appropriate public education).

Related services also include administration of injections by trained non-medical school personnel if the injections are necessary for a student to effectively participate in an educational program. *See e.g., Conejo Valley Unified Sch. Dist.,* Complaint No. 09-93-1002 (Oct. 27, 1993) 20 IDELR 1276 (holding a school district may not rely on a blanket rule against insulin administration to student with diabetes); *Culver City Unified Sch. Dist.*, Complaint No. 09-90-1007 (March 23, 1990), 16 EHLR 673, (district required to administer medications, allow access to medications, and develop emergency procedures under Section 504).

Here, there is ample authority demonstrating that the services at issue— diabetes management, including blood glucose monitoring and insulin and glucagon administration—must be provided if students with diabetes are to remain safely in school. There is also ample evidence demonstrating that the San Ramon Valley and Fremont Unified School Districts have failed to provide all necessary health-related services to students with diabetes. Thus, the districts have failed to provide a medically safe environment for students with diabetes and have failed to ensure that students with diabetes have the access to educational opportunities as do other students.

Defendant school districts have thus failed to meet their affirmative obligations by depriving plaintiffs of a free, appropriate public education as required by the foregoing laws and for that reason plaintiffs will prevail on their claims under the ADA, Section 504 and the IDEA.

3. Defendant CDE Has Failed To Exercise Its Legal Responsibility To Monitor And Enforce Plaintiffs' Rights To A Free, Appropriate Public Education

The CDE must monitor and enforce district compliance with federal laws. Under the IDEA, the CDE carries the state's broad overarching responsibility for the provision of educational services and for maintaining a policy that assures a free, appropriate public education to children with disabilities. *See Gonzales v. Maher*, 793 F.2d 1470, 1491-93 (9th Cir. 1985); *Doe ex rel. Doe v. State of Hawaii Dept. of Educ.*, 351 F.Supp.2d 998, 1011-1012 (D. Hawaii 2004) (citing *Bonner v. Lewis*, 857 F.2d 559, 566-67 (9th Cir. 1988)("The Supreme Court has repeatedly emphasized that federal regulations are 'an important source of guidance on the meaning of § 504") (*quoting School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987)); 20 U.S.C. §§ 1412; 34 C.F.R. § 300.600; Cal. Government Code § 7561; Cal. Education Code § 33112(a); *see also*, *Emma C. v. Eastin*, 985 F.Supp. 940, 948 (N.D. Cal. 1997)("While Section 504 and the ADA certainly may be loosely referred to as 'anti-discrimination' statutes, it is the regulations enacted pursuant to the acts that define the prohibited conduct.")[5]

[5] Under Rehabilitation Act regulation 34 C.F.R. § 104.4, the CDE may neither "[a]id or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity," 34 C.F.R. § 104.4(b)(1)(v), nor "utilize criteria or methods of administration . . . that perpetuate the discrimination of another recipient if both recipients are subject to

As discussed, the CDE is on notice of violations of the ADA, Section 504 and the IDEA, yet has failed to ensure that all children with diabetes who reside in California receive a "free, appropriate public education." *See supra* at 12-13. For this reason, too, plaintiffs will prevail on the merits in this lawsuit.

C. The Public Interest Favors An Injunction

In considering a preliminary injunction motion, the public interest is "an element that deserves separate attention in cases where the public interest may be affected." *Sammartano v. First Judicial Dist. Court*, 303 F. 3d 959, 974 (9th Cir. 2002); *Caribbean Marine Serv. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) ("...the district court must consider the public interest as a factor in balancing the hardships when the public interest may be affected.") A preliminary injunction is appropriate where there is "a fit (or lack of friction) between the injunction and the public interest." *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 120 (1st Cir. 2003).

The IDEA was implemented with the express goals of "ensur[ing] that all children with disabilities have available to them a free appropriate public education" and "ensur[ing] that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. §§ 1400(d)(1)(A), 1400(d)(1)(b). The operative sections of the ADA and Section 504 strive to accomplish the same important public interest. *See*, 42 U.S.C. § 12133; 34 C.F.R. §§ 104.33-104.37; *Smith v. Robinson*, 468 U.S. at 1017-18 n. 20.

The public interest would be well-served if California public schools fulfilled their legal obligation to provide diabetes care at school to ensure the health and safety of their students. As demonstrated earlier, providing appropriate care is reasonable and can readily be done with minimal burden to the school, and failing to do so endangers students' lives. There is no countervailing public interest in delaying relief. The Court should accordingly grant preliminary injunctive relief.

CONCLUSION

If granted, the preliminary injunction requested in this motion likely will be remembered as a

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common administrative control or are agencies of the same State." 34 C.F.R. § 104.4(b)(4).

simple step that triggered an easily achievable and invaluable sea change in the way our public schools accommodate the needs of children with diabetes. The Court should order the relief requested above.

DATED: November 2, 2005

REED SMITH LLP

By /s/
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and

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