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17 SUPERIOR COURT OF THE STATE OF CALIFORNIA

18 IN AND FOR THE COUNTY OF SACRAMENTO

19 AMERICAN NURSES ASSOCIATION;  
AMERICAN NURSES ASSOCIATION/  
20 CALIFORNIA; CALIFORNIA SCHOOL NURSES  
ORGANIZATION; and CALIFORNIA NURSES  
21 ASSOCIATION,

22 Plaintiffs/Petitioners,

23 vs.

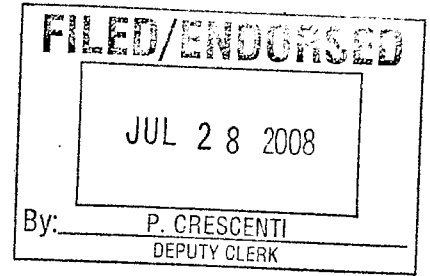
24 JACK O'CONNELL, STATE SUPERINTENDENT  
OF PUBLIC INSTRUCTION; and CALIFORNIA  
DEPARTMENT OF EDUCATION,

25 Defendants/Respondents,

26 and

27 AMERICAN DIABETES ASSOCIATION, an  
organization,

28 Intervenor.



Case No. 07AS04631

MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF VERIFIED  
SECOND AMENDED PETITION  
FOR WRIT OF MANDATE AND  
COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

Date: October 17, 2008

Time: 10:30

Dept.: 33

Judge: Hon. Lloyd G. Connelly

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1           Petitioners and Plaintiffs AMERICAN NURSES ASSOCIATION (“ANA”),  
2 AMERICAN NURSES ASSOCIATION/CALIFORNIA (“ANA/C”), CALIFORNIA  
3 SCHOOL NURSES ORGANIZATION (“CSNO”) and CALIFORNIA NURSES  
4 ASSOCIATION (“CNA”) (collectively “Petitioners”) respectfully submit the following  
5 Memorandum of Points and Authorities in Support of Their Verified Second Amended  
6 Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief.

7       I.     INTRODUCTION.

8           Petitioners are professional organizations representing nurses in California and  
9 across the country. Petitioners bring this action to stop Respondents from enforcing or  
10 attempting to enforce an unlawful regulation published in the form of a “Legal Advisory” in  
11 violation of the Administrative Procedures Act (Cal. Gov’t Code § 11340 *et seq.*), the  
12 Nursing Practice Act (Cal. Bus. & Prof. Code § 2700 *et seq.*), the California Education  
13 Code and the Constitution of the State of California.

14           On August 8, 2007, Respondent and Defendant Jack O’Connell, Superintendent of  
15 Public Instruction for the State of California (“O’Connell”), announced that the State of  
16 California had agreed to a settlement of the case known as K. C. et al v. Jack O’Connell, et  
17 al., case number C-05-4077MMC, in the U.S. District Court for the Northern District of  
18 California (“K. C. v O’Connell”). That case involved the provision of insulin to students  
19 who were seeking enforcement of their rights under Title 2 of the Americans with  
20 Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 791  
21 *et seq.*) (“Section 504”) and the Individuals with Disabilities Education Act (20 U.S.C.  
22 § 1400 *et seq.*) (“IDEA”). The settlement was, in essence, an “end run” attempt to achieve  
23 a result that the people of California had twice rejected in the legislative process. The  
24 Legal Advisory plainly violates the terms of California’s Nursing Practice Act (“NPA”),  
25 Business and Professions Code § 2700 *et seq.*, the Education Code and implementing  
26 regulations for both laws.

27           Pursuant to the settlement agreement, which was executed by Respondent  
28 O’Connell, in his official capacity as a defendant in that case and on behalf of the

1 California Department of Education (“CDE”), CDE published a statement entitled “Legal  
2 Advisory on the Rights of Students with Disabilities in California’s K-12 Public Schools”  
3 (“Legal Advisory”). A copy of the settlement agreement is attached hereto as Exhibit 1.  
4 The Legal Advisory is attached as Exhibit A to that settlement agreement and is also  
5 attached hereto as Exhibit 2, for easy reference.

6 The Legal Advisory is diametrically opposed to the long-standing published policy  
7 of CDE, in accord with the Nursing Practice Act, that unlicensed personnel do not have  
8 authority to administer insulin to schoolchildren. Prior to the settlement, Defendants’  
9 position was that the Nursing Practice Act, Business and Professions Code § 2725(b)(ii),  
10 and the California Code of Regulations, Title 5, § 604, authorize only the following classes  
11 of persons to administer insulin in California’s public schools under Section 504 and the  
12 IDEA: (1) the student, with authorization of the student’s licensed healthcare provider and  
13 parent/guardian; (2) a school nurse or school physician employed by the local education  
14 agency (“LEA”); (3) an appropriate licensed school employee (i.e., a registered nurse or a  
15 licensed vocational nurse) supervised by a school physician, school nurse or other  
16 appropriate individual; (4) a contracted registered nurse or licensed vocational nurse from a  
17 private agency or registry, or by contract with a public health nurse employed by the local  
18 county health department; (5) a parent/guardian who so elects; (6) the parent/guardian’s  
19 designee, if parent/guardian so elects, who shall be a volunteer who is not an employee of  
20 the local education agency; and (7) an unlicensed voluntary school employee with  
21 appropriate training, but only in emergencies as defined by Section 2727(d) of the Business  
22 and Professions Code (sometimes referred to as Nursing Practice Act or NPA). See CDE’s  
23 Program Advisory on Medication Administration, May 2002 at pp. 6-8, attached as  
24 Exhibit 8 to Petitioners’ Request for Judicial Notice, which was filed with the court on even  
25 date and is incorporated herein by reference). Section 2727(d) of the Nursing Practice Act  
26 defines emergencies as epidemics or public disasters.

27 In a complete reversal of that long-standing published policy, the Legal Advisory  
28 authorizes an eighth category of persons to administer insulin in California’s public

1 schools. Specifically, the Legal Advisory authorizes a “voluntary school employee who is  
2 unlicensed but who has been adequately trained to administer insulin pursuant to the  
3 student’s treating physician’s orders as required by the Section 504 Plan or the IEP  
4 (individual education plan under IDEA)” to administer insulin. As justification for creating  
5 a new category of individuals authorized to administer insulin in schools, the Legal  
6 Advisory states, “when no expressly authorized person is available under categories 2-4,  
7 supra, federal law – the Section 504 Plan or the IEP – must still be honored and  
8 implemented.” Ex. 2 at p. 13.

9 The NPA provides that “[n]o person shall engage in the practice of nursing, as  
10 defined in Section 2725, without holding a license which is in active status issued under this  
11 Chapter, except as otherwise provided in this Act.” Business and Professions Code 2732.

12 The Nursing Practice Act further defines the practice of nursing as:

13 “those functions, including basic healthcare, which help people cope with  
14 difficulties in daily living which are associated with their actual or potential  
15 health or illness problem or the treatment thereof which require a substantial  
16 amount of scientific knowledge or technical skill, and includes all of the  
17 following ...

18 (b) [d]irect and indirect patient care services, including, but not limited  
19 to, the administration of medications ... .”

20 Business and Professions Code § 2725(b). The Attorney General of California has opined  
21 that “the purpose of subdivision (b) of 2725 was not to add conduct which did not require a  
22 substantial amount of scientific knowledge or technical skill into the definition of the  
23 practice of nursing, but to assure that the actions which introduce medications and  
24 therapeutic agents into the body of a patient which do require a substantial amount of  
25 scientific knowledge or technical skill, such as injections by hypodermic syringe, were  
26 included in the definition of nursing.” 71 Op. Cal. Atty. Gen. 190, at p. 20 (1988).

27 The Education Code permits an unlicensed person to “assist” a student who is  
28 required to take a medication prescribed by a physician, but does not authorize  
administration of such medication. Education Code § 49423.

Not only does the Legal Advisory violate the NPA and the Education Code, but it is

1 also an illegal regulation published in contravention of the requirements of the  
2 Administrative Procedure Act. It also was published in violation of Article 3, Section 3.5  
3 of the California Constitution, which explicitly states that administrative agencies do not  
4 have the power “to refuse to enforce a statute on the basis that federal law or federal  
5 regulations prohibit the enforcement of such statute unless an Appellate Court has made a  
6 determination that the enforcement of such statute is prohibited by federal law or federal  
7 regulation.” The Legal Advisory and Respondents’ well-intended but misguided  
8 justification for publishing it is unlawful and the Legal Advisory should be invalidated.  
9 While Petitioners support proper implementation of federal anti-discrimination laws  
10 through administration of insulin to students who need such care, Respondents must make  
11 arrangements for properly licensed healthcare personnel to administer the insulin, as such  
12 arrangements are consistent with both federal and state law and are plainly in the best  
13 interests of the children.

14 In fact, in the K.C. v. O’Connell case, defendants recognized as much: “To the  
15 extent that [ADA] seek[s] relief which will enjoin [the school districts] to disobey state law  
16 with regard to insulin injections, [ADA] ask[s] far too much. State law establishes the  
17 scope of allowable medical practices, and no authority has been located wherein federal  
18 disability laws were held to “trump” such statutes and regulations.” Memorandum of  
19 Points and Authorities in Support of Defendants’ Motion to Dismiss in K.C. v. O’Connell,  
20 attached as Exhibit 7 to Petitioners’ Request for Judicial Notice. Defendants were correct  
21 in the K.C. v. O’Connell case. And while the Legal Advisory met its objective in resolving  
22 the K.C. v. O’Connell case, it goes too far and violates long-standing state law.

23 For these reasons and for the further reasons set forth in this Memorandum, the  
24 instant Petition for Writ of Mandate should be granted and the Legal Advisory published by  
25 CDE should be invalidated. Petitioners’ prayer for declaratory relief also should be granted  
26 and Respondents should be enjoined from undertaking any action or activity which  
27 implements, enforces or is in any way based upon the unlawful regulation established by  
28 the Legal Advisory.

1 II. BACKGROUND AND HISTORY.

2 A. Petitioners and their interests.

3 ANA is a national, nonprofit membership organization representing registered  
4 nurses whose practice is affected adversely by Respondents' actions and inactions. ANA is  
5 the professional association that represents the interests of the nation's 2.9 million  
6 registered nurses. ANA is comprised of 54 constituent member associations, one in every  
7 state of the United States, the District of Columbia, Guam, the U.S. Virgin Islands and  
8 Federal Military Nurses, with approximately 163,000 members. ANA develops the Code  
9 of Ethics for nurses, nursing's Social Policy Statement (the profession's social contract with  
10 society) and the Scope and Standards of Nursing Practice. ANA actively promotes patient  
11 safety, workplace rights, appropriate staffing, workplace and environmental health and  
12 safety and the public health. Among ANA's members are nurses practicing in the State of  
13 California, whose employers are directing them and will continue to direct them to provide  
14 training and oversight to unlicensed school personnel who will administer insulin to  
15 students pursuant to the Legal Advisory. Those registered nurses are and will continue to  
16 be at risk of disciplinary action by the State Board of Nursing, including the possible loss of  
17 their license to practice nursing, because providing such training and oversight is contrary  
18 to the Nursing Practice Act (Business and Professions Code §§ 2759, 2761), or they will be  
19 at risk for disciplinary action by their employers for a refusal to comply with the  
20 employer's assignment.

21 ANA/C is a constituent member of the American Nurses' Association. ANA/C  
22 uniquely represents the interests of the entire profession of nursing within California, as its  
23 membership is open to all categories of registered nurses. The mission of ANA/C includes  
24 the protection of patient health. ANA/C's membership includes California nurses working  
25 in California schools. The ability of those nurses to render safe patient care within the  
26 scope of practice defined by the Nursing Practice Act is affected adversely by Respondents'  
27 actions and inactions. ANA/C's nurse members have been and will continue to be directed  
28 to train unlicensed school personnel to administer insulin to California students and to

1 provide oversight to such unlicensed school personnel. Such activity is in violation of the  
2 Nursing Practice Act and jeopardizes their license to practice nursing. Business and  
3 Professions Code §§ 2759, 2761.

4 CSNO is an organization with approximately 1,400 members throughout California.  
5 Its members provide nursing services in all school settings, servicing children from birth to  
6 22 years of age. The goal of CSNO is to promote and strengthen the role of school nurses  
7 in the educational community. CSNO's school nurse members have been and will continue  
8 to be told to train and supervise unlicensed school personnel in the administration of insulin  
9 in violation of the Nursing Practice Act. Like the members of ANA, ANA/C and CNA,  
10 CSNO's members face a Hobson's Choice: comply with the directives of their employer  
11 and risk losing their licenses to practice nursing or refuse to engage in activity contrary to  
12 the Nursing Practice Act and risk discipline by their employer. Business and Professions  
13 Code §§ 2759, 2761.

14 CNA and its national arm, the National Nurses Organizing Committee ("NNOC"),  
15 is a nonprofit professional nursing association of more than 80,000 registered nurses,  
16 approximately 65,000 of whom practice in the State of California. CNA exists and operates  
17 for various purposes, including to establish and promote standards of nursing practice in the  
18 State of California and to represent registered nurses in relations with their employers  
19 concerning terms and conditions of employment and standards of professional practice and  
20 patient care. CNA is a leader in California in developing the professional role of registered  
21 nurses in meeting new and changing needs of patient care and in assisting the legislature,  
22 licensing board and health regulatory agencies in responding to new developments in  
23 healthcare.

24 Petitioners bring this action in their own right and in their representative capacities  
25 on behalf of their California members and for all registered nurses practicing in the State of  
26 California whose professional responsibility, scope of practice, standards of competent  
27 performance and independent authority necessary to fulfill their obligations as patient  
28 advocates will be immediately and irreparably compromised by the illegal regulation issued

1 by the CDE in the form of the Legal Advisory.

2 B. Respondents.

3 Respondent O'Connell is the Superintendent of Public Instruction for the State of  
4 California. He is sued solely in his official capacity. As the Superintendent, he is the ex  
5 officio director of education and the executive officer in control of defendant State  
6 Department of Education. Education Code §§ 33300 and 33303. Respondent California  
7 State Department of Education is an administrative agency in the state government, as  
8 provided in Education Code § 33300. As such Respondent is required to publish for notice  
9 and comment any regulation it proposes to implement and it may not implement a  
10 regulation without having followed such procedure. Government Code § 11346 *et seq.*  
11 Respondent O'Connell has limited statutory authority to publish regulations that are  
12 "consistent with law." Government Code § 11152. Respondent CDE has limited statutory  
13 authority to adopt regulations that are "not inconsistent with the laws of this state ... ."  
14 Education Code § 33031.

15 Respondent ADA was granted leave to intervene in this case by filing a Complaint  
16 in Intervention seeking to enforce its alleged right to enforce the unlawful Legal Advisory.

17 C. History.

18 On August 31, 2000, then-Governor Gray Davis signed Senate Bill 1549 into law.  
19 This bill added Section 49423.6 to the Education Code and required regulations to be  
20 developed regarding the administration of medication in the public schools. The bill  
21 required that regulations be developed in consultation with parents, representatives of the  
22 medical and nursing professions and others jointly designated by the Superintendent of  
23 Public Instruction, the Advisory Committee on Special Education and the Department of  
24 Health Services.

25 Thereafter, on February 21, 2002, A.B. No. 481 was introduced into the legislature.  
26 See Complete Bill History, A.B. No. 481, attached as Exhibit 9 to Petitioners' Request for  
27 Judicial Notice. That Bill would have amended Education Code § 49423 by permitting  
28 unlicensed school personnel to administer medications to school children in California. See

1 Bill Text, A.B. 481, attached as Exhibit 11 to Petitioners' Request for Judicial Notice.  
2 Although the A.B. 481 passed through the legislature, it was vetoed by Governor Davis,  
3 who noted that it did not contain sufficient immunity language to protect the school district  
4 or school personnel from liability. Veto of A.B. 481, attached as Exhibit 12 to Petitioners'  
5 Request for Judicial Notice.

6 One year later, on February 20, 2003, A.B. No 942 was introduced into the  
7 legislature. See Complete Bill History, A.B. No. 942, attached as Exhibit 13 to Petitioners'  
8 Request for Judicial Notice. That Bill again sought to amend Education Code § 49423 by  
9 permitting unlicensed school personnel to administer insulin and other medications to  
10 pupils in California's public schools. See Bill Text, A.B. 942 and A.B. 942, as amended,  
11 attached as Exhibits 14 and 15, respectively, to Petitioners' Request for Judicial Notice.  
12 See also, Chaptered Bill Text, A.B. 942, attached as Exhibit 16 to Petitioners' Request for  
13 Judicial Notice. The provisions of that Bill that would have permitted unlicensed school  
14 personnel to administer insulin in non-emergency situations was stricken before the  
15 legislation was enacted. See Bill Text, A.B. 942 and A.B. 942, as amended, attached as  
16 Exhibits 14 and 15, respectively, to Petitioners' Request for Judicial Notice. See also,  
17 Chaptered Bill Text, A.B. 942, attached as Exhibit 16 to Petitioners' Request for Judicial  
18 Notice.<sup>1</sup>

19 In 2003, CDE proposed regulations regarding administration of medication in public  
20 schools. Numerous written comments regarding the proposed regulations were submitted,  
21 including written comments from Petitioner ANA/C. ANA/C's written comments appear at  
22 Exhibit B to the Affidavit of Patricia Rae Hunter, R.N., M.N., Executive Director, ANA/C  
23 ("Hunter Aff."), attached hereto as Exhibit 3 and filed with the Court on even date.

24 On June 20, 2003, CDE published a Notice of Proposed Rulemaking setting a public  
25

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26 <sup>1</sup> A third attempt to pass similar legislation was initiated when, on February 21, 2008,  
27 S.B. 1487, "Emergency medical services: diabetes," was introduced into the legislature.  
28 On April 2, 2008, the first hearing on the Bill was canceled at the request of the author.  
See Complete Bill History, S.B. No. 1487, and Bill Text, S.B. No. 1487, attached as  
Exhibits 17 and 18, respectively, to Petitioners' Request for Judicial Notice.

1 hearing on the proposed regulation entitled “*Administering Medications to Pupils or*  
2 *Otherwise Assisting People in the Administration of Medication during the Regular School*  
3 *Day*” to take place on August 7, 2003. That hearing was attended by the Executive Director  
4 of ANA/C, Patricia Hunter (“Hunter”), who testified at the hearing about ANA/C’s  
5 objections to the proposed regulation, including: (1) concerns about unlicensed school  
6 personnel administering medication by injection in violation of the Nursing Practice Act;  
7 and (2) training and supervision of unlicensed school personnel. A copy of Hunter’s notes  
8 regarding the testimony that she gave at the public hearing is attached as Exhibit C to the  
9 Hunter Aff.

10 Due, in whole or in part, to overwhelming objections, CDE withdrew the proposed  
11 regulations. Hunter Aff. at ¶ 6.

12 In or about May 2005, CDE issued a “Program Advisory on Medication  
13 Administration” in which CDE expressed that unlicensed school personnel should not be  
14 permitted to administer medication by injections, except for emergency medications as  
15 permitted by law. See Petitioners’ Request for Judicial Notice, filed with the Court on even  
16 date, at Ex. 8.

17 After numerous failed attempts to change the law via the legislative process, on  
18 October 11, 2005, Intervenors and four students filed their class action law suit against  
19 O’Connell and others (“K.C. v. O’Connell“ or “the underlying case”). That case was not  
20 tried to conclusion, but rather was “settled” via the unlawful Legal Advisory.

21 III. ARGUMENT.

22 A. Petitioners are entitled to a writ of prohibition.

23 To obtain a writ of mandate, Petitioners must show a duty on the part of  
24 Respondents, a beneficial interest in compelling the performance of that duty and the  
25 inadequacy of other legal remedies. Code Civ. Proc. § 1085(a) and § 1086. Petitioners  
26 meet the requirements for issuance of the writ of mandate and, accordingly, the Court  
27 should issue the writ.

28 CDE clearly is subject to the rulemaking requirements (public notice and

1 opportunity to comment) of Chapter 3.5 of the Administrative Procedure Act (“APA”),  
2 Government Code §§ 11346-11351. CDE must follow those requirements if it wants to  
3 adopt any regulation of general application.

4 Respondents have a further duty under Government Code § 1152 to publish only  
5 those regulations that are “consistent with law” and to adopt only those regulations that are  
6 “not inconsistent with the laws of this state,” as required under Education Code § 33031.

7 Respondent O’Connell has a duty, as an officer of the State, to uphold the California  
8 Constitution. He swore an oath to uphold the Constitution of the State of California, an  
9 oath required of all public officials. Cal. Const. Art. XX, § 3; Gov. Code § 1360. He  
10 breached that duty by publishing the unlawful Legal Advisory contrary to Art. III, § 3 of the  
11 California Constitution.

12 Respondent CDE admits that it is an administrative agency in the state government  
13 as provided in Education Code § 33300. See Defendants/Respondents’ Answer to Verified  
14 Second Amended Petition for Writ of Mandate and Complaint for Declaratory and  
15 Injunctive Relief at p. 2, line 1. Respondents’ compliance with the APA in its prior  
16 (although futile) attempt to adopt regulations governing medication administration in  
17 schools demonstrates that they are aware of their duty to comply with the APA’s Notice  
18 and Comment requirement. Respondents’ duties are statutorily prescribed and are  
19 mandatory. Petitioners have established the first element necessary for issuance of the writ.

20 Pursuant to Code of Civil Procedure § 1086, to obtain a writ of mandate, Petitioners  
21 must demonstrate a beneficial interest in compelling the performance of Respondents’ duty.  
22 This requirement is greatly relaxed, if not virtually abandoned, if the matter involved is one  
23 of public interest or right. Residents of Beverly Glenn, Inc. v. City of Los Angeles, 34 Cal.  
24 App. 3d 117, 127 (1973). Petitioner is not required to show any legal or special interest in  
25 the result when the question is one of public right and the object of the petition for the writ  
26 of mandate is to procure the enforcement of a public duty. Common Cause v. Board of  
27 Supervisors, 49 Cal. 3d 432, 439 (1989); Green v. Obledo, 29 Cal. 3d 126 (1981);  
28 Timmons v. McMahan, 235 Cal. App. 3d 512, 518 (1991). It is sufficient that Petitioner “is

1 interested as a citizen in having the laws executed and the duty in question enforced.”

2 Timmons, 235 Cal. App. 3d at 518, citing Green, 29 Cal. 3d at 144.

3 There is no question that notice and the opportunity to comment on proposed  
4 regulations are matters of public right. It is also beyond dispute that the public has a right  
5 to ensure that Respondents do not exceed the statutory scope of their rulemaking authority.  
6 Likewise, the public has a clear right to ensure that the Nursing Practice Act, which was  
7 enacted for the protection of the public health, safety and welfare, including the safety and  
8 well-being of our school children, is enforced by state agencies and officials and that state  
9 agencies and officials do not wrongfully enact any regulation that renders it meaningless.  
10 Citizens of the State of California also have a right to enforce the California Constitution,  
11 including Article III, § 3.5. Accordingly, the public right exception to the requirement of  
12 beneficial interest applies in this case. Regardless, Petitioners have satisfied the second  
13 element necessary for issuance of the writ.

14 A Writ of Mandate “must be issued, in all cases where there is not a plain, speedy  
15 and adequate remedy, in the ordinary course of law.” Code of Civil Procedure § 1086. In  
16 this case, Petitioners have no possible alternatives to the writ procedure. Petitioners were  
17 not parties to the underlying action and have no plain, speedy and adequate remedy to  
18 ensure that the unlawful Legal Advisory issued pursuant to the Settlement Agreement  
19 between the parties to the underlying action is not enforced.<sup>2</sup>

20 There exists no adequate alternative legal remedy. Moreover, even if the court  
21 should determine that an alternative legal remedy exists, the court should exercise its  
22

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23 <sup>2</sup> Mandamus may issue to compel an official to exercise his discretion under a proper  
24 interpretation of the applicable law. Common Cause of California, 49 Cal. 3d at 442. A  
25 writ of mandate is appropriate to control abuse of agency discretion in cases such as  
26 this, where the agency’s action was so “palpably unreasonable and arbitrary as to  
27 indicate that it has abused its discretion as a matter of law.” Sanders v. City of Los  
28 Angeles, 3 Cal. 3d 252, 261 (1970). Given the clarity of the law, there can be no doubt  
that CDE’s decision to promulgate the Legal Advisory without complying with the  
APA and in violation of the Nursing Practice Act, CDE’s statutory rulemaking authority  
and Article 3 of the California Constitution is “palpably unreasonable and arbitrary.”  
Id.

1 discretion to entertain the writ proceeding and issue the writ because of the importance of  
2 the constitutional issue and the adverse impact of any delay on the health, safety and  
3 welfare of school children.<sup>3</sup>

4 Having satisfied all of the essential elements necessary to obtain a Writ of Mandate,  
5 the court should issue a Writ of Mandate setting aside, vacating and invalidating the Legal  
6 Advisory, for the reasons set forth below.

7 B. Respondents violated the administrative procedure act by publishing an  
8 unlawful regulation in the form of the Legal Advisory.

9 Respondent CDE is an “agency” and is required to follow the rulemaking  
10 requirements of the Administrative Procedure Act. Government Code § 11000 defines  
11 “agency” to include every state office, officer, department, division, bureau, board and  
12 commission. Government Code § 11000(a). There is no exception for the California  
13 Department of Education or the Superintendent of Public Instruction. Indeed, Respondents  
14 admit that they are an agency under Education Code § 33300. See Respondents Answer to  
15 Petitioners’ Second Amended Verified Petition for Writ of Mandate and Complaint for  
16 Declaratory and Injunctive Relief at ¶ 15.<sup>4</sup>

17 The APA subjects proposed agency regulations to certain procedural requirements.  
18 Specifically, pursuant to the APA, “[n]o state agency shall issue, utilize, enforce or attempt

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19 <sup>3</sup> The inadequacy of other remedies is a matter of judicial discretion which will not be  
20 disturbed in the absence of a showing that the court abused that discretion. W.A. Rose  
21 Company v. Municipal Court, 176 Cal. App. 2d 67, 74 (1959); San Joaquin County  
22 Employees Association v. City of Stockton, 161 Cal. App. 3d 183, 820 (1984).  
23 California courts routinely exercise their discretion in favor of issuing a writ, even  
24 where alternative legal remedies are available, where the case involves one of public  
25 importance or presents a significant constitutional issue. See, e.g., Brandt v. Superior  
26 Court, 37 Cal. 3d 813, 816 (1985); Britt v. Superior Court, 20 Cal. 3d 844, 851 (1978).  
27 Moreover, even where alternative legal remedies are available, courts may exercise their  
28 discretion in favor of issuing a writ where any delay in adjudicating an issue would  
have an adverse impact on the public welfare. See, e.g., Brown v. Superior Court, 5  
Cal. 3d 509, 515 (1971). This is certainly one of those cases, since any delay will have  
significant impact on the health and safety of California’s public school children.

<sup>4</sup> Curiously, although Respondents admit that they are an agency in ¶ 15 of their Answer  
to Petitioners’ Second Amended Petition for Writ of Mandate and Complaint for  
Declaratory and Injunctive Relief, they deny that they are an agency in ¶ 13 of their  
Answer.

1 to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general  
2 application, or other rule, which is a regulation as defined in Section 11342.600, unless the  
3 guideline, criterion, bulletin, manual, instruction, order, standard of general application, or  
4 other rule has been adopted as a regulation and filed with the Secretary of State ... .”  
5 Government Code § 11340.5(a). If any guideline, bulletin or other standard of general  
6 applications constitutes a “regulation” within the meaning of the APA, it may not be  
7 adopted, amended or repealed “unless it conforms with the basic minimum procedural  
8 requirement of Government Code § 11346(a) that are exacting.” Morning Star Company v.  
9 State Board of Equalization, 38 Cal. 4<sup>th</sup> 324, 333 (2006). The agency must give the public  
10 notice of its proposed regulation. Government Code § 11346.4. It must issue a complete  
11 text of the proposed regulation with a statement of the reasons for it. Government Code  
12 § 11346.2(a)(b). It must give interested parties an opportunity to comment (Government  
13 Code § 11346.8) and respond in writing to public comments. Government Code  
14 §§ 11346.8(a), 11346.9. The agency must forward a file of all materials on which it relied  
15 in the regulatory process to the Office of Administrative Law. Government Code  
16 § 11347.3(b). The Office of Administrative Law then reviews the regulation for  
17 consistency within the law, clarity and necessity. Government Code §§ 11349.1, 11349.3.  
18 Any regulation that fails to comply with these with requirements may be judicially declared  
19 invalid. Government Code § 11350.

20 The requirements of the APA apply to “regulations.” The Legal Advisory published  
21 by CDA pursuant to its settlement in the underlying action constitutes a regulation within  
22 the meaning of the APA. The APA defines regulation to mean “every rule, regulation,  
23 order, or standard of general application ... adopted by any state agency to implement,  
24 interpret, or make specific the law enforced or administered by it, or to govern its  
25 procedure.” There is a two-part test for determining whether something constitutes a  
26 regulation subject to the APA: (1) the agency must intend its rule to apply generally, rather  
27 than in any one specific case; and (2) the rule must “implement, interpret, or make specific  
28 the law enforced or administered by the agency.” Government Code § 11342(g).

1           The Legal Advisory in this case satisfies the two-part test for determining whether it  
2 is a regulation. Although the Legal Advisory was issued as part of a settlement in a  
3 particular case, it is intended to have a general application. A rule is intended to be a  
4 standard of general application so long as it declares how a certain class of cases will be  
5 decided. It need not apply universally. Roth v. Department of Veteran Affairs, 110 Cal.  
6 App. 3d 662, 630 (1980).

7           The Legal Advisory clearly is intended to apply generally to all students with  
8 diabetes in California's K-12 public schools and not only to the parties plaintiff in the  
9 underlying action. On its face, the Legal Advisory is directed to "all California school  
10 districts and charter schools." Ex. 2 at page 1. The Legal Advisory contains CDE's  
11 interpretation of Section 504 of the Rehabilitation of Act of 1973 and Title 2 of the ADA  
12 and sets forth rules that local education agencies ("LEAs") must follow to comply. For  
13 example, the Legal Advisory prohibits an LEA from having "a blanket policy or general  
14 practice that insulin or glucagon administration, or other diabetes related healthcare  
15 services, will only be provided by district personnel at one school in the district... ." Ex. 2  
16 at page 3.

17           The Legal Advisory also sets forth the position of the CDE about who may  
18 administer insulin in California to students with diabetes as a related service under Section  
19 504 and the IDEA. Specifically, in the Legal Advisory, CDE interprets and purports to  
20 modify the California Nursing Practice Act, stating that "Business and Professions Code  
21 § 2725(b)(2) [the Nursing Practice Act] and the California Code of Regulations, Title 5,  
22 § 604 authorize the following types of persons to administer insulin in California's public  
23 schools pursuant to a Section 504 plan or an IEP: ... (8) voluntary school employee who is  
24 unlicensed but who has been adequately trained to administer insulin pursuant to the  
25 student's treating physician's orders as required by the Section 504 Plan for the IEP." Ex. 2  
26 at p. 13. The Legal Advisory does not limit this rule to the school district defendants or the  
27 parties plaintiff in the underlying action. To the contrary, it has been published to all of  
28 California's K-12 public schools. Undoubtedly, the Legal Advisory applies generally and

1 declares CDE's interpretation of services that LEAs are required to provide to California  
2 school children. Accordingly, it is a regulation that should have been issued only after  
3 complying with the procedural requirements of the APA.

4 The Legal Advisory is nothing more than an illegal regulation promulgated by CDE  
5 in order to satisfy the requirements of Section 49423.6 of the Education Code while  
6 circumventing the APA. Any suggestion by Respondents that the Legal Advisory does not  
7 constitute a "regulation" is disingenuous, at best, and is belied by the fact that CDE followed  
8 the procedures of the APA in its failed attempt to adopt similar regulations in 2003.

9 By failing to comply with the notice and comment requirements, Respondents have  
10 frustrated the intent and purpose of the APA. The requirements of the APA are designed to  
11 ensure "bureaucratic responsiveness and public engagement in agency rulemaking."  
12 Morning Star Company, 38 Cal. 4<sup>th</sup> at 333. "One purpose of the APA is to ensure that those  
13 persons or entities who a regulation will affect have a voice in its creation, as well as a  
14 notice of the law's requirements so that they can conform their conduct accordingly."  
15 Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4<sup>th</sup> 557, 568-69 (1996), quoting  
16 Armistead v. State Personnel Board, 22 Cal. 3d 198, 204-05 (1978). By promulgating the  
17 Legal Advisory without complying with the notice and comment requirements of the APA,  
18 CDE silenced the voices of all of those persons affected by the regulation, except those who  
19 were parties to the underlying action. By implementing the *de facto*, unlawful regulation in  
20 violation of the APA, Respondents have put students, licensed nurses and unlicensed  
21 personnel at risk of great harm without giving them the courtesy to make their objections  
22 known, which is their absolute statutory right.

23 Even worse, because the Respondents implemented this illegal regulation in violation  
24 of the APA, the Office of Administrative Law never had the opportunity to review the Legal  
25 Advisory for consistency with other laws. In fact, as set forth herein, the Legal Advisory is  
26 not consistent with other laws. The Legal Advisory is wholly inconsistent with the intent and  
27 express language of the Nursing Practice Act, makes a mockery of Education Code section  
28 49423 and is inconsistent with Article III, Section 3.5 of the California Constitution.

1 Respondents' violation of the APA in this case is particularly egregious, since the  
2 unlawful regulation is diametrically opposed to the longstanding policy of CDE that  
3 unlicensed school personnel do not have authority to administer insulin in schools. See  
4 CDE "Program Advisory on Medication," attached as Exhibit 8 to Petitioners Request for  
5 Judicial Notice; see, also, Exhibit 7 to Petitioners' Request for Judicial Notice (CDE's  
6 Memorandum of Points and Authorities in Support of Motion to Dismiss in K.C. v.  
7 O'Connell), at pp. 10, 14.<sup>5</sup>

8 The curious results arising from the inconsistencies between the unlawful Legal  
9 Advisory and other laws are particularly revealing and disturbing. For example, the Legal  
10 Advisory permits any unlicensed school personnel who volunteers to do so (and receives  
11 some unspecified training) to administer, by any mode, any dose of any of the five types of  
12 insulin, including mixed short acting and longer acting insulins, to a kindergarten student  
13 who receives insulin on a sliding scale and who may be unable to adequately articulate  
14 factors that would affect the appropriate dose or timing of insulin that the student should  
15 receive. These factors include, and are not limited to, what or how much the student has  
16 eaten and at what times the student ate that day, the amount of exercise or other physical  
17 exertion that the student has engaged in on that day and other variations in the student's  
18 routine that might affect the student's blood glucose levels. On the other hand, if that same  
19 student was sitting in an emergency room in a hospital in California, a certified nursing  
20

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21 <sup>5</sup> It is important to note that in K.C. v. O'Connell, CDE and O'Connell took the same  
22 position with respect to who is authorized to administer insulin as Petitioners take in the  
23 instant case. For example, in their Motion to Dismiss in the underlying action, CDE  
24 and O'Connell stated that the defendant school districts properly "followed state law  
25 with regard to those employees who can administer insulin through a syringe. It is  
26 plaintiff who seeks to have unlicensed medical professionals to inject her with insulin,  
27 *which is contrary to state law.*" See Ex. 7 to Petitioners' Request for Judicial Notice at  
28 p. 10 (emphasis added); see, also, id. at p. 14, stating: "under state law, only licensed  
medical professionals, parents and parent designees can administer medication by  
injection. (See Education Code sections 44871, 44873, 44874-44878, 49400, 49422(a)  
and 49423; CCR, Title 5, sections 600, 601(e)(f)(h) and 604). The CDE, the agency  
responsible for promulgating regulations in support of the IDEA, has issued a Program  
Advisory that non-medical school staff may not be trained to inject medications such as  
insulin."

1 assistant with years of training and experience would not be permitted to administer insulin  
2 to that student without violating the Nursing Practice Act. Moreover, a nurse in the hospital  
3 would not be able to delegate that task to unlicensed hospital personnel because there is no  
4 statutory authority authorizing that delegation. In fact, the administration of insulin is so  
5 dangerous that it is standard policy in health care facilities for two registered nurses to  
6 check the medication before it can be administered by a registered nurse. See Affidavit of  
7 Mary Jean Schumann (“Schumann Aff.”), attached hereto as Exhibit 4 and filed with the  
8 court on today’s date, at ¶ 13; and Affidavit of Dale Parent (“Parent Aff.”), attached hereto  
9 as Exhibit 5 and filed with the court on today’s date, at ¶ 13.

10 By way of further example, if the school was a health facility licensed pursuant to  
11 Section 1250 of Health and Safety Code, the practice authorized by CDE’s unlawful  
12 regulation would be prohibited under Section 2725.3 of the Nursing Practice Act, which  
13 forbids unlicensed personnel from performing nursing functions in lieu of a registered nurse  
14 and explicitly states that unlicensed personnel shall not be permitted to perform functions  
15 under the direct clinical supervision of a registered nurse that require a substantial amount  
16 of scientific knowledge and technical skills, including the administration of medication.  
17 Business and Professions Code § 2725.3. The fact that a young child with limited abilities  
18 to express how he is feeling could receive insulin from the school secretary is ludicrous,  
19 when an adult, who is perfectly capable of communicating his needs, feelings and  
20 circumstances, sitting in a health facility could not receive insulin from unlicensed hospital  
21 personnel, who have years of medical training and experience, even if supervised by a  
22 registered nurse.

23 The administration of insulin is serious business with potentially lethal results.  
24 While Petitioners have no doubt that Intervenor ADA means well, its efforts to achieve a  
25 result via the Legal Advisory that it could not achieve in the Legislature are misguided.  
26 Still worse, any “benefit” to allowing unlicensed and untrained personnel to administer  
27 insulin is far outweighed by its potentially disastrous consequences. These consequences  
28 and the obvious conflicts between the Legal Advisory and existing California law would

1 have been raised and considered had Defendants followed the APA. They did not. Thus,  
2 the government and the public which it serves were deprived of the opportunity to comment  
3 upon and to fully debate the effects and consequences of the Legal Advisory.

4 C. The Legal Advisory violates the Nursing Practice Act.

5 The California Board of Registered Nursing (“CBRN”) is the only agency with  
6 statutory authority to interpret and enforce the Nursing Practice Act and define and the  
7 practice of nursing. Business and Professions Code § 2725(e). The CBRN’s interpretation  
8 of the NPA is that “Administration of medications, including insulin, is a nursing function  
9 that may not be performed by an unlicensed person unless expressly authorized by statute.”  
10 CBRN’s Official Position re: ADMINISTRATION OF INSULIN IN SCHOOLS BY  
11 UNLICENSED PERSONNEL, California Department of Education Case Settlement, K.C.  
12 et al. v. Jack O’Connell, et al., November 30, 2007, a certified copy of which is attached  
13 hereto as Exhibit 6. See, also, CBRN’s EXPLANATION OF THE SCOPE OF RN  
14 PRACTICE, a certified copy of which is attached hereto as Exhibit 7, at pp. 1-3.  
15 Accordingly, Respondents have violated the Nursing Practice Act by redefining the practice  
16 of nursing and publishing an unlawful regulation that incorrectly interprets the Nursing  
17 Practice Act. Moreover, by adopting a regulation that modifies the Nursing Practice Act,  
18 Respondents have exceeded the scope of their statutory rulemaking authority. Education  
19 Code § 33031; Government Code § 11152.

20 The Nursing Practice Act prohibits unlicensed persons from administering  
21 medications, including insulin. Under the NPA, the practice of nursing includes:

22 “those functions, including basic healthcare, that help people cope with  
23 difficulties in daily living that are associated with their actual or potential  
24 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:

25 \* \* \*

26 (2)... the administration of medications and therapeutic agents, necessary to  
27 implement a treatment, disease prevention or rehabilitative regiment ordered  
by and within the scope of practice of a physician... .”

28 The purpose of this Section of the NPA is “to assure that the actions which

1 introduce medications and therapeutic agents into the body of a patient which do require a  
2 substantial amount of scientific knowledge or technical skill, such as injections by  
3 hypodermic syringe, were included in the definition of nursing.” 71 Op. Cal. Attorney 190,  
4 at page 20 (1988). Insulin is a medication that is introduced into the body of a patient by  
5 injection with hypodermic syringe. Schumann Aff. at ¶ 10. In fact, insulin is such a  
6 dangerous medication and requires such substantial scientific knowledge to administer that  
7 it has been placed on the Institute for Safe Medication Practices List of High Alert  
8 Medications. Schumann Aff. at ¶ 11 and Exhibit B thereto. “High alert medications are  
9 drugs that bear a heightened risk of causing significant patient harm when they are used in  
10 error.” Schumann Aff. at Ex. B. The consequences of an error when administering high  
11 alert medications, including insulin, “are clearly more devastating to patients” and require  
12 “special safeguards to reduce the risk of errors.” Id. For these reasons, it is standard  
13 practice in hospitals to require registered nurses to follow special procedures when  
14 administering insulin. Schumann Aff. at ¶ 13; Parent Aff. at ¶ 13.

15 The administration of insulin to diabetic school children is a nursing function which  
16 requires a particular amount of scientific knowledge and technical skill, not only because  
17 insulin is a high alert medication but because, as ADA acknowledged in its complaint in  
18 K.C. v. O’Connell:

19 “Both type 1 and type 2 diabetes present serious health risks to school aged  
20 children and require careful monitoring and treatment. To maintain health  
21 and to prevent serious and potentially fatal consequences, diabetes must be  
22 managed 24 hours a day, 7 days a weeks. Treating diabetes requires a  
23 careful balancing of insulin intake, food, and physical activity to keep blood  
24 glucose levels within the normal range. Blood glucose levels must be  
25 frequently monitored and appropriate treatment responses (such as  
26 administering insulin or eating a snack) must be taken depending on the  
27 measured glucose level. For most school children with type 1 diabetes,  
blood glucose levels must be monitored throughout the school day and doses  
of insulin (either by injection or by an insulin pump) must be given during  
school hours. In addition to blood glucose monitoring, some students with  
type 2 diabetes also require insulin and/or oral diabetes medications during  
the school day. In many instances, children with diabetes, because of their  
age or other conditions, need assistance throughout the school day in  
managing their condition to maintain their health and well being.”

28 Petitioners’ Request for Judicial Notice at Ex. 7.

1           The process of administering insulin is a complicated one. Schumann Aff. at ¶ 14.  
2 It involves more than filling a hypodermic syringe and pushing a plunger. Schumann Aff.  
3 at ¶ 14. It requires an assessment of the patient, including the patient's history, a physical  
4 assessment, which may include: blood glucose monitoring, which might be done in any  
5 variety of ways with a variety of different devices; a determination of whether the insulin  
6 dose needs to be adjusted to correct for abnormal blood glucose level, for exercise and  
7 activity, to match carbohydrate intake or in anticipation of a change in the child's usual  
8 regimen; the selection of a correct syringe to avoid a mistake in dosage; proper preparation  
9 of the syringe, assuring sterility in the procedure; adherence to contamination and infection  
10 avoidance techniques and practices; proper injection procedure to avoid tissue damage; and  
11 post administration assessment for adverse reactions and complications. Schumann Aff. at  
12 ¶ 15; Parent Aff. at ¶ 14. Such complications and adverse reactions include, and are not  
13 limited to, the following:

- 14           • hypoglycemia, which can include heart palpitation, tremor, tingling of the  
15           extremities or tongue, headache, anxiety, blurred vision, blurred speech,  
16           abnormal behavior, unsteady movement, personality changes, disorientation,  
17           unconsciousness, seizures and death;
- 18           • scarring and poor absorption of the insulin due to improper injection site  
19           rotation;
- 20           • systemic allergy, including rash over the entire body, shortness of breath,  
21           wheezing, reduction in blood pressure, rapid pulse, sweating, and anaphylaxis;
- 22           • hyperglycemia, which can include drowsiness, thirst, loss of appetite, nausea,  
23           vomiting, dehydration and loss of consciousness.

24 All of this requires a tremendous amount of scientific knowledge and technical skill and the  
25 exercise of sound nursing judgment. Schumann Aff. at ¶ 16; Parent Aff at ¶ 15.

26           Clearly, the administration of medication is a function requiring a substantial  
27 amount of scientific knowledge and technical skill and constitutes the practice of nursing  
28 within the meaning of the NPA. Schumann Aff. at ¶ 17; Parent Aff. at ¶ 16.

1 Section 2795(a) of the Nursing Practice Act makes it unlawful for any person to  
2 administer insulin, unless that person has been duly licensed under the NPA. Business and  
3 Professions Code § 2795(a). An exception exists permitting unlicensed personnel to  
4 provide nursing services in case of an emergency. The NPA defines emergency as an  
5 “epidemic or public disaster.” Business and Professions Code § 2727(d). Emergencies do  
6 not include personnel shortages, fiscal constraints or lack of available licensed personnel.  
7 Such situations do not excuse violations of the Nursing Practice Act or give Respondents  
8 the right to sanction or direct nurses or unlicensed school personnel to violate the NPA  
9 without fear of reprisal.

10 Notwithstanding the clear and unambiguous provisions of the Nursing Practice Act,  
11 the Legal Advisory published by CDE requires California public schools to permit  
12 unlicensed personnel to administer insulin in direct contravention of the NPA, in situations  
13 other than “emergencies.” The Legal Advisory purportedly permits unlicensed personnel to  
14 engage in the unlawful practice of nursing. Accordingly, in exchange for “volunteering” to  
15 administer insulin, unlicensed school personnel may receive a citation from the Board of  
16 Registered Nursing for the unlicensed practice of nursing. Hunter Aff. at ¶ 8; Title 16,  
17 California Code of Regulations § 1435.3. In addition, these “volunteers” could be  
18 subjected to criminal prosecution and receive criminal punishment, including a fine of up to  
19 \$1,000 and imprisonment of up to one year. Business and Professions Code § 2799.<sup>6</sup>  
20 Moreover, these “volunteers” open themselves up to liability for injuries to the students  
21 resulting from the volunteers’ negligence. The Legal Advisory, like A.B. No. 481 that was  
22 vetoed, does nothing to protect these volunteers or the school districts from any liability  
23 arising from the medical treatment that they provide.

24 The unlawful Legal Advisory also violates the NPA by requiring licensed nurses to  
25

26 <sup>6</sup> Stating: “Any person who violates any of the provisions of this chapter is guilty of a  
27 misdemeanor and upon a conviction thereof shall be punished by imprisonment in the  
28 county jail for not less than 10 days nor more than one year, or by a fine of not less than  
twenty dollars (\$20) nor more than one thousand dollars (\$1,000), or by both such fine  
and imprisonment.”

1 train and supervise unlicensed school personnel in insulin administration, despite the fact  
2 that licensed nurses have no statutory authority to delegate this nursing function. The  
3 California Board of Registered Nursing has authority to discipline registered nurses  
4 working in a supervisory capacity for authorizing unlicensed persons to perform tasks  
5 which they knew the unlicensed person was not capable of performing safely or did not  
6 have the authority to perform. Business and Professions Code § 2761; 59 Ops. Cal.  
7 Attorney General 537 (1976). Accordingly, nurses whose employers direct them to train  
8 and/or supervise unlicensed personnel in the administration of insulin pursuant to the Legal  
9 Advisory face the possibility of an enforcement action, which could result in a suspension  
10 of their license to practice nursing for a period of one year or revocation of their license.  
11 Business and Professions Code § 2759. In addition, licensed personnel who train and/or  
12 supervise unlicensed school employees to administer insulin may be held liable for injuries  
13 resulting to a student as a result of the negligence of the unlicensed school employee and  
14 for negligent training and/or supervision of the unlicensed employee. The Legal Advisory  
15 does nothing to protect licensed nurses from the threat of such litigation.

16 By far the worst problem with the Legal Advisory is that it places California's  
17 diabetic school children at risk of harm by subjecting them to inferior medical care and  
18 treatment by an individual who does not have the education, training and experience to  
19 perform the often complicated and always potentially dangerous job of administering  
20 insulin. The unlawful regulation issued by CDE in the form of this Legal Advisory places  
21 California's diabetic school children at risk of sustaining the very harm which it purports to  
22 protect against, and against which the Nursing Practice Act, through its licensing  
23 requirements, was enacted to protect.

24 The Legal Advisory conflicts with and authorizes conduct which is in clear violation  
25 of the Nursing Practice Act and should be declared void. Furthermore, Respondents should  
26 be prohibited and precluded from enforcing or taking any other action in furtherance of the  
27 Legal Advisory.

28

1 D. The Legal Advisory violates Education Code section 49423.  
2 Education Code section 49423(a) authorizes, in certain limited situations,  
3 “designated school personnel” to assist a student in taking certain prescribed medication.  
4 The Legal Advisory completely reads “assist” out of the statute and allows non-trained  
5 personnel to directly administer insulin. If non-licensed personnel are not authorized to  
6 assist with insulin injections, it is plain that such untrained persons cannot administer this  
7 drug.

8 That the Legal Advisory violates Education Code section 49423 is apparent when  
9 one considers section 49423(b)(2). That section specifically refers to the requirements for a  
10 pupil to carry and self-administer auto-injectable epinephrine. That section makes clear  
11 that school personnel are not injecting the students and also requires students’ parents or  
12 guardians to sign a release. On its face, section 49423(b) does not include insulin. The  
13 Legal Advisory violates the Education Code.

14 E. The Legal Advisory was enacted in violation of Article 3 of the California  
15 Constitution.

16 Section 3.5 of Article 3 of the California Constitution states:

17 “An administrative agency, including an administrative agency created by  
18 the Constitution or an initiative statute, has no power:

19 \* \* \*

20 (c) To declare a statute unenforceable, or to refuse to enforce a statute on the  
21 basis that federal law or federal regulation prohibits the enforcement of such  
22 statute, unless an Appellate Court has made a determination that the  
enforcement of such statute is prohibited by federal law or federal  
regulation.”

23 Cal. Const., Art. III, § 3.5 (2008). See Greenier v. Workers Compensation Appeals Board,  
24 6 Cal. 4<sup>th</sup> 1028, 1038 (1993).

25 By adopting the Legal Advisory authorizing unlicensed school employees to  
26 administer insulin, Respondents have failed and refused to enforce the licensing  
27 requirements of the Nursing Practice Act. As justification, Respondents cite two federal  
28 laws: Section 504 of the Rehabilitation Act of 1973 and Title 2 of the ADA. Ex. 2.

1 Specifically, Respondents say that:

2 “When no expressly authorized person is available under categories 2-4,  
3 supra, federal law – the Section 504 Plan or the IEP – must still be honored  
4 and implemented. Thus, a category number 8 is available under federal law:

5 8. Voluntary School Employee Who Is Unlicensed But Who Has Been  
6 Adequately Trained To Administer Insulin Pursuant To The Student’s  
7 Treating Physician’s Orders As Required By the Section 504 Plan or the  
8 IEP.”

9 Ex. 2 at p. 13. Categories 2-4 of the Legal Advisory are references to medical personnel  
10 who are licensed in accordance with the Nursing Practice Act. Category number 2 includes  
11 school nurses employed by the LEA. Category number 3 refers to “appropriately licensed  
12 school employee (i.e., a registered nurse or a licensed vocational nurse) who is supervised  
13 by a school physician, school nurse, or other appropriate individual.” Category number 4  
14 refers to a “contracted registered nurse or licensed vocational nurse from a private agency  
15 or registry, or by contract with a public health nurse employed by the local county health  
16 department.” By creating category number 8 (unlicensed voluntary school employees)  
17 authorized to administer insulin, Respondents have rendered the licensing requirements of  
18 the Nursing Practice Act meaningless. In other words, according to the unlawful Legal  
19 Advisory, unlicensed school employees may engage in the unlawful practice of nursing  
20 without a license and California’s public schools no longer have any need for a school  
21 nurse. It is certainly difficult to imagine that a school nurse would be needed to handle any  
22 situation that might arise in the school if the school secretary can perform a task as complex  
23 and that carries with it such a risk of adverse consequences as the administration of a high-  
24 alert medication to a student with a condition as complicated and serious as diabetes.

25 The unlawful Legal Advisory is entirely unnecessary. Compliance with the federal  
26 regulations cited by Respondents as rationale and authority for refusing to enforce the  
27 licensing requirements of the Nursing Practice Act would be accomplished by requiring  
28 LEAs to provide licensed personnel to administer insulin in California’s public schools. To  
the extent possible, legislation should be read and applied in a manner that achieves  
consistency, rather than conflict. For whatever reason, Respondents determined to subject

1 all of the stakeholders in this matter to the risks of harm set forth herein, rather than to meet  
2 the requirements of Section 504 and the ADA through available, legal methods.  
3 Respondents' actions in so doing are difficult to reconcile with their longstanding position  
4 that "no authority has been located wherein federal disability laws were held to "trump""  
5 the Nursing Practice Act. CDE's Memorandum of Points and Authorities in Support of  
6 Motion to Dismiss filed in K.C. v. O'Connell, attached as Ex. 7 to Petitioners' Request for  
7 Judicial Notice.

8 Because the unlawful regulation in the form of the Legal Advisory published by  
9 Respondents violates Article 3, Section 3.5 of the California Constitution, it should be  
10 declared void.

11 F. Respondents violated the scope of their rulemaking authority.

12 Respondent O'Connell may publish regulations that are "consistent with law."  
13 Government Code § 11152. Pursuant to Education Code 33031, the State Board of Education  
14 may only adopt "rules and regulations not inconsistent with the laws of this state." As noted  
15 above, the illegal regulation published and adopted by Respondents in this case is inconsistent  
16 with the laws of California. Accordingly, Respondents have exceeded the scope of their  
17 statutory authority in publishing and adopting the unlawful Legal Advisory, which is void *ab*  
18 *initio*. Moreover, the Legal Advisory violates the California Constitution, as noted above.  
19 Fiscal concerns are no excuse to violate the California Constitution. See, e.g., Hartzell v.  
20 Connell, 35 Cal. 3d 899, 912 (1984). To the extent that economics came into play in  
21 publishing the unlawful Legal Advisory, that question should "very properly be addressed to  
22 the legislative department of the state government." Id. at p. 913.

23 G. Petitioners are entitled to declaratory and injunctive relief.

24 The above analysis also establishes that Petitioners are entitled to declaratory and  
25 injunctive relief. As noted, this case involves an actual controversy concerning the rights  
26 and legal duties of the parties. Petitioners assert that Respondents had a duty to comply  
27 with the requirements of the Administrative Procedure Act before publishing the Legal  
28 Advisory, which is contrary to the Nursing Practice Act and the Education Code and was

1 published in violation of the California Constitution. Respondents have denied that they  
2 have any such duty. See Respondents Answer to Petitioners Verified Second Amended  
3 Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief at ¶¶ 2,  
4 31, 32, 38-40, and 47.

5 Petitioners attempted to resolve this matter without the aid and intervention of the  
6 court. On September 10, 2007, Petitioner ANA/C met with Respondent O'Connell and  
7 asked him to rescind the directive regarding the administration of insulin by unlicensed  
8 school personnel. He declined to do so. Hunter Affidavit at ¶ 7.

9 Clearly, this matter is an actual case in controversy concerning the legal rights and  
10 duties of the parties that will not be resolved without the aid and intervention of this court.  
11 Accordingly, Petitioners are entitled to declaratory relief.

12 Likewise, Petitioners are entitled to injunctive relief. Petitioners and their members  
13 have suffered and continue to be immediately threatened by irreparable harm as set forth  
14 herein. As previously discussed, there exists no adequate remedy at law. Accordingly,  
15 Petitioners are entitled to an injunction against Respondents prohibiting and precluding  
16 them from enforcing or taking any other action under the unlawful Legal Advisory.

17 IV. CONCLUSION.

18 For the reasons set forth herein, the Court should (a) issue a writ of mandate under  
19 Code of Civil Procedure Section 1085 (or, in the alternative, Section 1094.5) (i) setting  
20 aside, vacating and invalidating the "Legal Advisory"; (ii) enjoining Respondents from  
21 taking any action in connection with the Legal Advisory; (iii) compelling Respondents to  
22 act in compliance with all applicable laws and regulations respecting any future decisions  
23 and/or findings concerning the acceptable methods for administering insulin to California  
24 students; (b) enjoin Respondents from taking any further action to implement or enforce the  
25 Legal Advisory; (c) declare that Respondents' issuance of the Legal Advisory was in excess  
26 of their jurisdiction, an abuse of discretion, arbitrary and capricious and in violation of  
27 applicable state law, including without limitation, the Administrative Procedure Act, the  
28 Nursing Practice Act and the California Constitution.

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Dated: July 26 2008.

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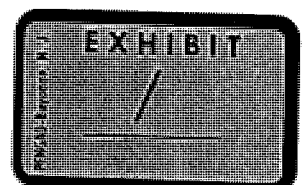
# EXHIBIT 1

## SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into as of this 24 day of July, 2007 by 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 and the American Diabetes Association ("Association"), an organization, on the one hand (collectively "Plaintiffs") and Jack O'Connell, in his official capacity as Superintendent of Public Schools for the State of California; The State Board Of Education Of The State Of California; and the California Department Of Education ("CDE") on the other hand (collectively "Defendants");

WHEREAS, on October 11, 2005, Plaintiffs filed a Civil Rights Complaint for Declaratory and Injunctive Relief (Class Action) ("the Complaint") against Defendants in the United States District Court for the Northern District of California ("this Court"), Case No. C05-4077-MMC ("the Action"); and

WHEREAS, the Complaint alleges that, in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. ("ADA"), the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq. (amended by Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, Title I) ("IDEA") and applicable federal regulations, Defendants have failed to ensure that all students with diabetes in grades Kindergarten through Twelve who are within the jurisdiction of California's public schools receive the diabetes health related services they need to safely attend school and have failed to investigate



and monitor school districts' compliance with federal law requiring such services;  
and

WHEREAS, the Complaint seeks to compel Defendants to take appropriate action to ensure that every eligible child with diabetes in California public schools receives appropriate diabetes health related services necessary to ensure a free appropriate public education in the least restrictive environment ("FAPE") as required by the IDEA and Section 504 as well as related federal and state laws and regulations; and

WHEREAS, Defendants deny any liability with respect to the allegations made in the Complaint and affirm that nothing in this Agreement constitutes an admission by any of the Defendants of any such wrongdoing, or liability, or otherwise constitutes a violation of the IDEA, Section 504, the ADA, and/or other related federal and state laws and regulations; and

WHEREAS, the Plaintiffs and Defendants desire to resolve the Action and believe that its resolution, as detailed in this Agreement, is in the public interest.

NOW, THEREFORE, for and in consideration of the mutual understandings contained in this Agreement and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

1. Legal Advisory. Within 30 days of the Effective Date as defined in paragraph 26 below of this Agreement, CDE will issue the statement attached as

Exhibit A, entitled "*Legal Advisory on the Rights of Students with Diabetes in California's K-12 Public Schools*" ("Legal Advisory").

a. In General. The Legal Advisory summarizes the rights of eligible students with diabetes to receive FAPE pursuant to the IDEA and Section 504/ADA as well as state anti-discrimination statutes while attending school and school-sponsored activities which exist at the time of the execution of this Settlement Agreement. It is intended to be a compilation of those rights, and it neither enlarges nor detracts from same. Within 30 days of the Effective Date of this Agreement, CDE will distribute this Legal Advisory, by mail and electronic mail, to all California K-12 public school districts (Local Education Agencies ("LEAs") or "districts") and Special Education Local Plan Areas ("SELPA's"). CDE will also post the Legal Advisory on its website within 30 days of the Effective Date of this Agreement. The legal requirements referenced in the Legal Advisory will be followed in all CDE monitoring, complaint resolution, and technical assistance activities, as set forth below at paragraphs 2, 3, 4, 5, 6, and 8.

b. Amendments/Modifications. CDE will maintain the Legal Advisory as an official document and comply with the terms of this paragraph for a period of not less than two and one-half years from the Effective Date of this Agreement. If any of the legal requirements referenced in the Legal Advisory change, then CDE may amend the Legal Advisory as set out in this paragraph. At least 30 days before any such amendment(s) are made, the Parties shall meet and confer on any proposed amendment(s). If Plaintiffs do not agree with the CDE's proposed amendment(s), then Plaintiffs will be entitled to file a motion with the Court opposing the amendment(s) as not being required by a change in law and the proposed amendment(s) shall not go into effect until ruled upon by the Court.

For an additional two year period, should the CDE wish to amend the Legal Advisory to reflect changes in the law, the CDE agrees that it will first meet and confer with Plaintiffs' counsel not less than 30 days before it makes any such amendment(s). In addition, the Legal Advisory may be amended by agreement of the Parties.

2. Training. As part of its regularly scheduled on-going training and in-service activities, CDE will inform LEAs and SELPAs of their obligations under federal and state law to identify and provide FAPE to all eligible students with diabetes consistent with the Legal Advisory. CDE will post all such training materials on its web site (<http://www.cde.ca.gov/>).

3. Complaint Procedures-IDEA and Section 504/ADA. CDE will investigate and act upon pending and future compliance complaints and appeals filed pursuant to Title 5, California Code of Regulations (5 CCR), sections 4600-4670 and 4900-4962 in general and sections 4650(a)(6) and 4650(a)(7) in particular. When appropriate and with parent/guardian consent, Association and DREDF will give CDE 15 calendar days notice in order to resolve a complaint on an informal basis prior to filing a formal Title 5 administrative complaint. The 15 days will begin to run upon receipt by the CDE of notice provided by DREDF and/or the Association. Timelines for resolution of the complaint will be governed by Title 5, section 4662 and will start to run when a formal complaint is filed.

4. Technical Assistance-IDEA and Section 504/ADA. CDE will provide any technical assistance that it conducts to individuals, agencies and organizations in a manner which is consistent with the legal requirements referenced in its Legal Advisory regarding compliance with IDEA and Section

504/ADA. See generally 5 CCR sections 4900 and 4902. In providing technical assistance to any individual, agency, organization, SELPA, or LEA regarding services required to be provided for students with diabetes who are eligible for services under the IDEA and/or Section 504, CDE will reference the Legal Advisory and its location on the website and use it as the basis for the technical assistance it gives. CDE also will reference the National Diabetes Education Program guide entitled *"Helping the Student with Diabetes Succeed: A Guide for School Personnel"* ("NDEP guide") that can currently be accessed on the CDE website (<http://www.cde.ca.gov/lr/he/hn/diabetesmgmt.asp>). CDE will maintain written records of each such request for technical assistance.

5. IDEA Compliance and Monitoring Programs. CDE will monitor California's LEAs in a manner consistent with its normal monitoring processes and schedules to ensure ongoing compliance with their obligations under the IDEA to conduct child find, evaluate for eligibility, and provide FAPE to IDEA-eligible children with the disability of other health impairment (OHI) based upon chronic or acute health problems, including diabetes as required by 34 C.F.R 300.8, subdivisions (a) and (c) (hereinafter "IDEA-eligible children with diabetes") as discussed in the Legal Advisory. Specifically, CDE will monitor compliance in its statewide compliance and monitoring systems as follows:

a. Uniform Complaint Resolution System.

i. CDE will accept for direct intervention IDEA complaints on behalf of children with diabetes by individuals, including interested third parties, public agencies, or organizations ("complainant") as required by 34 C.F.R. sections 300.151 - 300.153 and 5 CCR

sections 4600(b) and 4650(a)(7). CDE will conduct compliance complaint investigations according to 34 C.F.R. sections 300.151-300.153. As discussed in the Legal Advisory, compliance complaints can be filed regarding the identification, evaluation, placement, or provision of a FAPE including the provision of special education and related services to students with diabetes. 34 C.F.R. section 300.153(a). For example, a complainant may file a complaint alleging that an LEA's policies and/or practices violate the right of a student alleging IDEA eligibility to receive an individualized assessment for eligibility for special education, or the right of an IDEA-eligible child with diabetes to be provided with diabetes health related services pursuant to the IEP process, and/or any dispute arising out of the IEP process. When a complaint under the IDEA is filed regarding the disability OHI involving a student with diabetes, CDE will investigate policies and practices related to the provision of any required related health care services as well as the relevant factual circumstances of the child with diabetes who is IDEA-eligible or alleging IDEA eligibility, if such factual circumstances are relevant. Complaints alleging systemic violations need not identify individually affected students so long as the complaint contains sufficient facts to support a claim that there is a violation of federal or state law (such as an allegation that a policy or practice of general applicability is inconsistent with the legal standards referenced in the Legal Advisory). Where an unlawful policy or practice of general applicability is alleged to exist with sufficient factual specificity, such as those supported by parent statements of representations made to them, oral or written policy, memorandum or forms, it is not necessary to identify a specific student in the district.

ii. CDE will investigate and issue compliance reports within timeframes required by Federal Regulations and Title 5 Uniform Complaint Procedures and will include appropriate corrective actions, as applicable, such as:

1. Ensuring that LEA policies and procedures provide for the following:

a. the LEA conducts "child find" activities to ensure IDEA evaluation of students with disabilities, including students with diabetes;

b. diabetes medication administration services, based on a physician's written orders, are specified by IEP teams for IDEA-eligible students with diabetes whenever needed at school and school-sponsored activities (including field trips and other extracurricular activities), including, but not limited to, administration of insulin and glucagon;

c. parents/guardians are not required by an IEP team or LEA to provide diabetes health related services to IDEA-eligible children with diabetes during school hours or school sponsored activities, or to agree to any particular placement or waiver of any rights, as a condition of receiving such services;

d. school placement decisions are not made by IEP teams or LEAs with regard to IDEA-eligible children with diabetes on the basis of any blanket policy or practice of general applicability that diabetes health care services will only be provided at certain schools or sites in the LEA;

e. decisions about the provision of related health care services to IDEA eligible children with diabetes are not made by an IEP team or LEA on the basis of any blanket policy that fails to take into account the individual needs of an IDEA-eligible child with diabetes; and,

f. IEP teams ensure the evaluation of and provision of related health services to IDEA-eligible children with diabetes.

2. Requiring, as appropriate, that any LEA, which has been found by CDE pursuant to its administrative discretion to be noncompliant with federal and/or state statutes and/or regulations as set forth in the Legal Advisory, provide CDE with a list of all known or identified children with diabetes attending the LEA and, for each such student, data that lists (1) which special education and/or health related services are required for such student according to his or her IEP; (2) if no services have been provided, the reasons for the decision(s) not to provide

same; and (3) the plan for the provision of services, e.g., IEP/IDEA and/or medical management plan. In the event CDE finds students who have not been provided with an IEP due to failures of the LEA in child find activities including referrals and initial assessment for possible special education programs and services, CDE will require the LEA to provide assurances that children with diabetes are being offered IDEA evaluations and that IDEA-eligible children are provided with required services by IEP teams in conformity with the legal standards referenced in the Legal Advisory, including the documentation of same in an IEP as appropriate.

b. State Monitoring Reviews. CDE will review school LEA policies and procedures (including forms) relating to services provided to children with diabetes who allege or have been found eligible for IDEA with the disability of OHI or another recognized disability involving diabetes in all Special Education Self Reviews (SESR), Verification Reviews (VR), and Facilitated District Reviews (FR). CDE will revise its monitoring tools, including "Verification of Policies and Procedures," "Verification of Student Records," and "Parents Questionnaire" forms as attached in Exhibit B. CDE will ensure that LEA policies and procedures (including forms) conform to the legal standards referenced in the Legal Advisory to assure FAPE under IDEA.

c. Ongoing Analysis of Compliance History and Trends. CDE will identify allegations and findings of non-compliance with the procedural safeguards and other rights of IDEA-eligible children with the disability of OHI or another recognized disability involving diabetes in its existing system of

tracking IDEA compliance issues and trends for two years from the effective date of this Settlement Agreement. This analysis will be based on an evaluation of calls to the CDE parent information line, compliance complaints records, and results of due process mediations and hearings. CDE will maintain a record of such identified allegations and findings of non-compliance, including the source of the allegations or findings as well as any actions taken by CDE in response to any identified allegations or findings of non-compliance with the IDEA. In addition, for the next two years until the completion of the current four-year review cycle CDE will continue to maintain all records and logs pursuant to this Paragraph of the Agreement and will provide them to Plaintiffs upon request within 30 days if practicable.

d. Parent Input Meetings. CDE will seek information from parents within an LEA regarding 1) health issues related to evaluation and 2) the provision of required health related services as defined in the IEP of children who are or who are alleging IDEA eligibility with the disability of OHI or another recognized disability involving diabetes at the parent meetings it regularly conducts as part of the verification review process to assist LEAs in highlighting or identifying LEA strengths and weaknesses. CDE will reference the Legal Advisory at each of its parent input meetings. CDE will maintain a record of input received from parents regarding allegations of legally noncompliant services to IDEA-eligible children with diabetes and/or failure to comply with the legal standards referenced in the Legal Advisory.

e. Targeted Verification Reviews. For a period of two years following the effective date of this agreement, Plaintiffs' counsel have the right to submit data on any LEA in California where Plaintiffs' counsel have a

stated factual reason, such as statements from parents or school personnel, correspondence, policies, forms, and/or other documents, alleging that due to an LEA's policies and/or practices, 1) children with diabetes are not being evaluated for IDEA eligibility according to legal standards referenced in the Legal Advisory, or 2) IDEA-eligible children with diabetes are not being provided with appropriate special education and/or related services that are compliant with the IDEA. CDE will include the recommended LEA data in the verification review selection process it selects for each of the next two years upon receipt of documentation evidencing those LEA policies and/or practices that are in violation of IDEA, unless CDE finds the documentation insufficient. LEAs which meet all of CDE's verification review criteria will be selected for review.

6. Section 504/ADA Complaint Resolution and Technical Assistance.

CDE will enforce Section 504/ADA and state nondiscrimination rights through the UCP Complaint Resolution System and technical assistance activities described below.

a. Uniform Complaint Resolution System.

i. CDE will accept Section 504 complaints alleging discrimination, including failure to provide FAPE, for direct intervention as required by 5 CCR section 4650(a)(6) filed by individuals, third parties, public agencies or organizations on behalf of students with diabetes eligible or alleging eligibility under Section 504 and/or state law and investigate such complaints in conformity with the applicable Title 5 standards as established by the three required elements of such

complaints established by section 4650(a)(6). Complaints alleging systemic violations need not identify individually affected students so long as the complaint contains sufficient facts to support a claim that there is a violation of federal or state law (such as an allegation that a policy or practice of general applicability is inconsistent with the legal standards referenced in the Legal Advisory). Where an unlawful policy or practice of general applicability is alleged to exist with sufficient factual specificity, such as those supported by parent statements of representations made to them, oral or written policy, memoranda or forms, it is not necessary to identify a specific student in the district. CDE will also accept and investigate appeals from LEA decisions as provided in 5 CCR sections 4632-4633.

ii. Upon receipt of such a complaint or appeal, CDE will:

Except as otherwise provided in 5 CCR section 4633, investigate and issue investigation reports within timeframes required by 5 CCR section 4662, including appropriate corrective actions requiring conformity with the legal requirements referenced in the Legal Advisory when appropriate to remedy non-compliance, such as:

1. Ensuring that LEA policies and procedures provide for the following:

a. the LEA conducts "child find" activities pursuant to 34 C.F.R. section 104.32 in order to ensure Section 504 evaluations of students with diabetes;

b. diabetes medication administration services, based on a physician's written orders, are specified by Section 504 teams for 504-eligible students with diabetes whenever needed at school and school-sponsored activities (including field trips and other extracurricular activities), including, but not limited to, administration of insulin and glucagon;

c. parents/guardians are not required by a Section 504 team or LEA to provide diabetes health related services to 504-eligible children with diabetes during school hours or school sponsored activities, or to agree to any particular placement or waiver of any rights, as a condition of receiving such services;

d. school placement decisions are not made by Section 504 teams or LEAs with regard to 504-eligible students with diabetes on the basis of any blanket policy or practice of general applicability that diabetes health care services will only be provided at certain schools or sites in the LEA;

e. decisions about the provision of related health care services to 504-eligible students with diabetes are not made by a 504 team or LEA on the basis of any blanket policy that fails to take into account the

individual needs of an 504-eligible student with diabetes;  
and

f. Section 504 teams ensure the evaluation for  
and provision of related health services for 504-eligible  
children with diabetes.

2. Requiring, as appropriate, that any LEA, which has  
been found by CDE pursuant to its administrative discretion to  
be noncompliant with federal and/or state statutes and/or  
regulations as set forth in the Legal Advisory, provide CDE with  
a list of all known or identified students with diabetes attending  
the LEA, and for each such student data that lists (1) which  
special education and/or health related services have been  
provided to each such student; (2) if no services have been  
provided, the reasons for the decision(s) not to provide same;  
and (3) the plan chosen for the provision of services/  
accommodations, e.g., IEP/IDEA, Section 504 Plan; and/or  
medical management plan. In the event CDE finds students  
who have not been provided with Section 504 Plans, due to  
failure of the LEA in child find activities including referrals and  
initial evaluation for possible 504 accommodations, CDE will  
require the LEA to provide assurances that students with  
diabetes are being offered Section 504 evaluations and that  
eligible students are provided with required accommodations  
and services by 504 teams in conformity with the legal

standards referenced in the Legal Advisory, including the documentation of same by means of 504 plan as appropriate.

b. Technical Assistance. As discussed in paragraph 4 above, CDE will utilize its existing technical assistance services to inform LEAs of their obligations under Section 504/ADA and related state law to provide a FAPE to 504 eligible students with diabetes. See generally 5 CCR sections 4900, 4902, and 4962.

7. Enforcement. CDE agrees that it will enforce compliance as authorized by 5 CCR sections 4670 and 4962 as well as its Quality Assurance Process ("QAP").

8. Monitoring and Reporting Provisions. CDE agrees that all changes and revisions to its statewide monitoring system needed to comply with the foregoing terms will be completed within 120 days. For a period of two years following the implementation of the foregoing changes and revisions to the statewide monitoring system, the CDE will meet with Plaintiffs' counsel to report on the following monitoring activities two times per year, as follows: 1) March 28, 2008; 2) September 30, 2008; 3) March 30, 2009; and 4) September 30, 2009. For the period ending March 28, 2008, CDE will provide documentation from 30 days after the date of the execution of the Settlement Agreement to March 28, 2008. At these meetings, CDE will provide Plaintiffs' counsel with a summary of the following information:

a. Description of technical assistance services provided pursuant to CDE's obligations to enforce the procedural safeguards of IDEA-eligible

children with diabetes and Section 504 eligible students with diabetes, including a description of all technical assistance provided and all requests made to CDE for technical assistance relating to the procedural safeguards and other rights of identified students with OHI, including IDEA-eligible children with diabetes and Section 504 eligible students with diabetes as well as a summary of the type of individual (e.g., parent, advocate, teacher, etc.), agency, organization, SELPA or LEA to whom such technical assistance is provided. CDE will make available all related materials developed by or with the cooperation of CDE and published by any means, including the Internet, which contain technical assistance provided by CDE or any representative or consultant to CDE on any matter related to the procedural safeguards and other rights of IDEA-eligible children with diabetes and Section 504 eligible students with diabetes 14 days prior to the meeting.

b. Progress on implementation of an effective state-level monitoring system described above, including:

i. Data regarding UCP complaints related to students with diabetes received during the reporting period, including copies to be made available of each of the following: 1) complaints, 2) CDE compliance investigation reports, 3) CDE determinations made pursuant to 5 CCR section 4633, 4) requests for reconsideration and CDE's responses, and 5) all documents related to actions taken by CDE to ensure corrective actions issued are carried out by LEAs (noting that information that identifies a particular student will be redacted pursuant to CDE's administrative discretion in order to avoid any violations of federal or state statutes governing student privacy

rights such as the Family Education Rights and Privacy Act, 20 U.S.C. section 1232g) (FERPA), the Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-2 (HIPAA), and the California Education Code);

ii. Making available CDE's Check List approval pertaining to each SELPA's annual service plan that may relate to the provision of health related services to IDEA-eligible students with diabetes;

iii. Making available a summary of CDE Monitoring Reviews that present any noncompliant finding from the Item Table (Exhibit B) regarding IDEA-eligible students with diabetes, within the SESR, FR, and VR as described in paragraph 5.b., and enforcement actions as described in paragraph 7, including:

1. List of LEAs which have been subject to enforcement from the Effective date of this Agreement to date of meeting (and thereafter between each succeeding meeting dates), related to findings regarding the disability of OHI, including IDEA-eligible children with diabetes;

2. Any copies of those LEA policies related to diabetes care, including medication administration policies, that have been gathered by CDE as part of its compliance activities;

3. A summary of any information compiled by CDE pursuant to parent input meetings as described in paragraph

5.d. above, and a description of actions taken by CDE in response to any allegations or findings of non-compliance that were brought to CDE's attention at such meetings as related to identified students with OHI, including IDEA-eligible students with diabetes.

9. Release of Defendants. Except for the executory obligations hereunder, Plaintiffs, on behalf of themselves and their guardians ad litem, parents, heirs, predecessors, successors, agents, affiliates, parent and/or subsidiary entities, successors and assigns, servants, employees, officers, directors, and assigns hereby release and forever discharge Defendants and their assigns, successors, agents, servants, employees, elected officials, Board members, officers, superintendents, and attorneys, from any and all claims, including but not limited to any claims for losses, damages, causes of action, and/or liabilities, known or unknown, asserted or unasserted, liquidated or unliquidated, in any manner which arise from the allegations of the Action, occurring up until the Effective Date of this Agreement. This release does not apply to actions concerning the resolution of future and pending Title 5 complaints or the identification and correction of noncompliance by LEAs or SELPAs. Further, it does not bar Plaintiffs from pursuing any relief against CDE in state court, with the exception that for two years following the Effective Date of this Agreement, Plaintiffs shall not bring a state court action on the issue of whether CDE's position on state law set forth in section IV of the Legal Advisory is a correct interpretation of state law. In addition, Plaintiffs agree to meet and confer with the CDE prior to initiating such state court litigation.

10. Dispute Resolution Procedure. In the event of any dispute arising out of or related to any alleged material breach of the Agreement by the CDE, Plaintiffs shall notify counsel for the CDE in writing of the alleged material breach and the requested remedy. Upon receipt of this notification, CDE will have 30 days to respond and engage in a meet and confer process with Plaintiffs in order to resolve the dispute. In the event that a resolution cannot be achieved, Plaintiffs may file a motion alleging a material breach of this agreement in this Court. "Material breach" is defined as any significant noncompliance with the terms of this agreement, including a refusal to distribute the Legal Advisory as required by paragraph 1(a), any change to or modification of the Legal Advisory except as specified in paragraph 1(b), any significant noncompliance with the complaint resolution provisions (paragraphs 3, 5, 6, 7), monitoring and reporting provisions (paragraphs 5, 8), or any refusal to meet with Plaintiffs' counsel as specified in this agreement. The remedy available to Plaintiffs under this paragraph is injunctive relief ordering compliance with the agreement if a material breach is found; it does not include the remedy of contempt as a sanction. Nothing in this agreement limits the ability of Plaintiffs to seek redress in state court under principles of contract law for any alleged breach of this agreement not covered in this paragraph.

11. Compromise Between the Parties. This Agreement represents a compromise between the parties that was reached in order to ensure that health care that is provided to students with diabetes in California elementary and secondary schools is compliant with the legal standards of the Legal Advisory but shall not be construed as an admission by plaintiff American Diabetes Association that it has in any manner changed its position on how diabetes care can and should best be provided in the school setting as reflected in its Position

Statements "Standards of Medical Care in Diabetes" and "Diabetes Care in the School and Day Care Setting," published in Diabetes Care 30, Supplement 1 (January 2007) at S4-S41, S66-S73, and the National Diabetes Education Program guide entitled "Helping the Student with Diabetes Succeed: A Guide for School Personnel" (NDEP guide), including, but not limited to, the American Diabetes Association's position that insulin can be safely administered by trained non-medical school staff.

12. Obligations Under Agreement Survive Releases. Notwithstanding any other provision in the Agreement to the contrary, the obligations arising under this Agreement are not affected by and shall survive the releases granted in this Agreement.

13. Attorneys' Fees/Costs. Within 60 days of the Effective Date of this Agreement, Defendants agree to pay \$400,000 to the Disability Rights Education and Defense Fund, co-counsel for Plaintiffs in this Action, for Plaintiffs' attorneys' fees and costs, and to pay to Reed Smith, LLP, co-counsel for Plaintiffs in this Action, for their costs in their prosecution of this matter, the total sum of \$30,000. The parties acknowledge that Reed Smith, LLP, has acted in a pro bono capacity with respect to achieving this Agreement and is waiving a claim for potential attorneys' fees in excess of \$1,800,000 in order to obtain this settlement. This provision for the payment of legal fees and costs is subject to the customary state approval processes, including approval by the Department of Finance. Plaintiffs hereby release any further claims to fees or costs incurred in the prosecution of this Action to date.

14. Notification to Court of Settlement and Dismissal of Action. Within five [5] court days of execution of this Agreement by the parties, counsel for Plaintiffs shall file a Notice of Settlement, a Request for Dismissal of Action, and the Proposed Order of dismissal attached as Exhibit C with the United States District Court for the Northern District of California, with this Court retaining jurisdiction for two and one-half years from the effective date of this Agreement, solely to rule on any motion filed pursuant either to Paragraph 1.b. or to Paragraph 10, of this agreement.

15. No Admission. The parties acknowledge that the purpose of this Agreement is to avoid the delay of protracted litigation and the expenses associated therewith. This Agreement is the result of a compromise of disputed claims. Throughout this Action, Defendants have denied any liability and/or fault. In executing the Agreement, no party to this Agreement shall be deemed to have admitted any fault or liability in connection with any matter or thing. Likewise, by entering this Agreement Plaintiffs do not waive any claims not expressly settled herein.

16. Other Documents. The Parties agree to execute such other documents and to take such other and further action as may be necessary to finalize and perform this Agreement.

17. Successors in Interest. This Agreement is binding upon, and inures to the benefit of the Parties, their successors, agents, servants, employees, officers, attorneys and assigns.

18. No Oral Modifications. In no event will any waiver, release, alteration or modification of any of the terms of this Agreement be valid unless it is in writing and signed by all parties. This Agreement cannot be modified or terminated oral.

19. Severability. If any term or provision of this Agreement shall be held invalid or unenforceable by a court of competent jurisdiction, the validity of the remaining terms shall not be affected.

20. Counterparts. This Agreement may be signed in one or more counterparts, each copy having the same force and effect as an original, and shall be effective upon its execution by the parties.

21. Captions and Interpretation. Section titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement or any provision hereof. This Agreement is mutually drafted, and no provision in this Agreement is to be interpreted for or against either Party because that Party or its legal representative drafted such provision.

22. Number and Gender. Whenever required by the context hereof, the singular shall be deemed to include the plural and the plural shall be deemed to include the singular, and the masculine, feminine and neutral genders shall each be deemed to include the other.

23. Entire Agreement. This Agreement, including Exhibits A and B, constitutes the entire agreement between the parties pertaining to the subject

matter hereof and fully supersedes any and all prior understandings, representations, warranties and agreements between the parties pertaining to the subject matter hereof. The consideration recited herein is the sole, complete and entire consideration for the releases, and there is no agreement, oral or written, express or implied, whereby the undersigned are to receive at any time or in any event or upon the happening of any contingency or upon the development or the discovery of any fact, circumstance or condition, any further consideration of any kind whatsoever from any party.

24. Voluntary Agreement. Each of the Parties further represents and declares that it has carefully read this Agreement and knows its contents and that each Party signs the same freely and voluntarily.

25. Facsimile Signatures. This Agreement may be executed by facsimile signatures, and any such signature should have the same force and effect as an original signature.

26. Effective Date. The "Effective Date" of this Agreement shall be July 24, 2007.

27. Statutory References. The reference to each statute or regulation in this Settlement Agreement is to that statute or regulation in effect as of the Effective Date of this Agreement.

28. Notices. Any written notice under this Agreement shall be delivered as follows:

If to the Defendants:

Marsha A. Bedwell

Amy Bisson Holloway  
Allan H. Keown  
Defendants Jack O'Connell, California Department  
of Education, and the State Board of  
Education  
1430 N. Street, Suite 5319  
Sacramento, CA 95814-5901

If to Plaintiffs:

Arlene Mayerson (SBN 79310)  
Larisa Cummings (SBN 131076)  
DISABILITY RIGHTS EDUCATION AND DEFENSE  
FUND, INC.  
2212 Sixth Street  
Berkeley, CA 94710  
Telephone: 510.644.2555  
Facsimile: 510.841.8645

James M. Wood  
Kenneth J. Philpot  
Reed Smith LLP  
1999 Harrison Street, Suite 2400  
Oakland, CA 94612-3572  
Facsimile: (510) 273-8832  
Email: jmwood@reedsmith.com  
kphilpot@reedsmith.com

IN WITNESS WHEREOF, the parties have executed this Agreement as of the  
date(s) set forth below.

FOR PLAINTIFFS:

Dated: \_\_\_\_\_

\_\_\_\_\_  
K.C., by and through Erica C., her  
guardian

Dated: \_\_\_\_\_

\_\_\_\_\_  
A.A., by and through Stacey A., her  
guardian

FOR PLAINTIFFS:

Dated: 7/13/07



K.C., by and through Erica C., her guardian

Dated: \_\_\_\_\_

A.A., by and through Stacey A., her guardian

Dated: \_\_\_\_\_

M.C., by and through Laurie C., her guardian

Dated: \_\_\_\_\_

K.F., by and through Shereé F., her guardian

Dated: \_\_\_\_\_

American Diabetes Association

By \_\_\_\_\_

Its \_\_\_\_\_

If to Plaintiffs:

Arlene Mayerson (SBN 79310)  
Larisa Cummings (SBN 131076)  
DISABILITY RIGHTS EDUCATION AND DEFENSE  
FUND, INC.  
2212 Sixth Street  
Berkeley, CA 94710  
Telephone: 510.644.2555  
Facsimile: 510.841.8645

James M. Wood  
Kenneth J. Philpot  
Reed Smith LLP  
1999 Harrison Street, Suite 2400  
Oakland, CA 94612-3572  
Facsimile: (510) 273-8832  
Email: jmwood@reedsmith.com  
kphilpot@reedsmith.com

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date(s) set forth below.

FOR PLAINTIFFS:

Dated: \_\_\_\_\_

\_\_\_\_\_  
K.C., by and through Erica C., her guardian

Dated: 7/11/07

Stacey A.  
A.A., by and through Stacey A., her guardian

Dated: \_\_\_\_\_

\_\_\_\_\_  
M.C., by and through Laurie C., her guardian

If to Plaintiffs:

Arlene Mayerson (SBN 79310)  
Larisa Cummings (SBN 131076)  
DISABILITY RIGHTS EDUCATION AND DEFENSE  
FUND, INC.  
2212 Sixth Street  
Berkeley, CA 94710  
Telephone: 510.644.2555  
Facsimile: 510.841.8645

James M. Wood  
Kenneth J. Philpot  
Reed Smith LLP  
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Oakland, CA 94612-3572  
Facsimile: (510) 273-8832  
Email: [jmwood@reedsmith.com](mailto:jmwood@reedsmith.com)  
[kphilpot@reedsmith.com](mailto:kphilpot@reedsmith.com)

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date(s) set forth below.

FOR PLAINTIFFS:

Dated: \_\_\_\_\_

\_\_\_\_\_  
K.C., by and through Erica C., her guardian

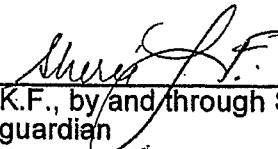
Dated: \_\_\_\_\_

\_\_\_\_\_  
A.A., by and through Stacey A., her guardian

Dated: July 14, 2007

Laurie C.  
\_\_\_\_\_  
M.C., by and through Laurie C., her guardian

Dated: 7-24-07

  
\_\_\_\_\_  
K.F., by and through Shereé F., her  
guardian

Dated: \_\_\_\_\_

American Diabetes Association

By \_\_\_\_\_

Its \_\_\_\_\_

FOR DEFENDANTS:

Dated: \_\_\_\_\_

\_\_\_\_\_  
Jack O'Connell

Dated: \_\_\_\_\_

The Board of Education of the State of  
California

\_\_\_\_\_  
By \_\_\_\_\_

Its \_\_\_\_\_

Dated: \_\_\_\_\_

M.C., by and through Laurie C., her guardian

Dated: \_\_\_\_\_

K.F., by and through Shareé F., her guardian

Dated: 7/19/07

American Diabetes Association

Shereen Arent

By Shereen Arent

Its Managing Director of Legal Advocacy

FOR DEFENDANTS:

Dated: July 12, 2007

Jack O'Connell  
Jack O'Connell

Dated: \_\_\_\_\_

\_\_\_\_\_  
M.C., by and through Laurie C., her  
guardian

Dated: \_\_\_\_\_

\_\_\_\_\_  
K.F., by and through Shereé F., her  
guardian

Dated: \_\_\_\_\_

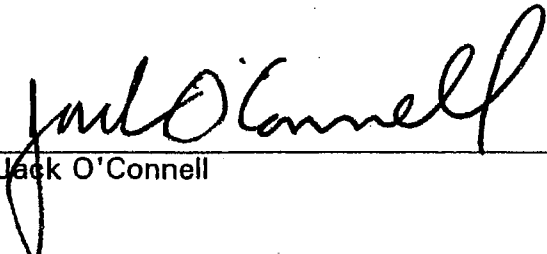
American Diabetes Association

\_\_\_\_\_  
By \_\_\_\_\_

Its \_\_\_\_\_

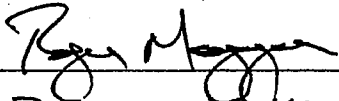
FOR DEFENDANTS:

Dated: July 12, 2007

  
\_\_\_\_\_  
Jack O'Connell

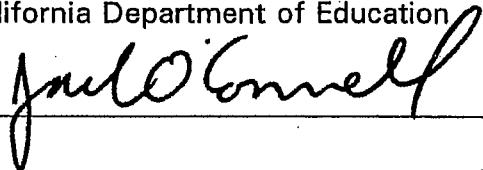
Dated: 7/16/07

The Board of Education of the State of  
California

  
By ROGER MAGYAR  
Its EXECUTIVE DIRECTOR

Dated: July 12, 2007

California Department of Education

  
By \_\_\_\_\_  
Its \_\_\_\_\_

## EXHIBIT A

### LEGAL ADVISORY ON RIGHTS OF STUDENTS WITH DIABETES IN CALIFORNIA'S K-12 PUBLIC SCHOOLS

Pursuant to the recent Settlement Agreement in *K.C. et al. v. Jack O'Connell, et al.*, Case No. C-05-4077 MMC, in the United States District Court for the Northern District of California, the California Department of Education (CDE) has agreed to remind all California school districts and charter schools of the following important legal rights involving students with diabetes who have been determined to be eligible for services under either the Individuals with Disabilities Education Act (IDEA) and related California law or Section 504 of the Rehabilitation Act of 1973 (Section 504) and related California law.

The CDE notes that this is a complex area of the law. Every effort has been made to be clear and concise in providing this advisory.

#### I. **The Applicability of Two Federal Anti-Discrimination Statutes (Section 504 and the ADA) to those Public School Students with Diabetes Who Require Diabetes Health Related Services While Attending K-12 Schools in California.**

Two federal anti-discrimination statutes, Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 (ADA), together establish rights for eligible students with diabetes in California's public schools. Together, they serve to protect such students from discrimination based upon their disability including the right to receive a free appropriate public education (FAPE). The two statutory schemes are treated synonymously. (*Wong v. Regents of University of California*, 192 F.3d 807, 816 n. 26.) Hence, in this Legal Advisory, Section 504 will mean both Section 504 as well as the ADA unless otherwise noted.

#### A. **Eligibility**

In general, a student will be determined to have a disability under Section 504 if he/she has a mental or physical impairment that substantially limits one or more major life activities, such as eating, breathing, caring for oneself, performing manual tasks, hearing, speaking, walking, and learning. (See 34 CFR sec. 104.4, subds. (j), (k), and (i).) Accordingly, learning is not the only major life activity that must be considered when determining eligibility under Section 504. (*Rock Hill (OH) Local Schools*, 37 IDELR 222 (OCR 2002).)

The Ninth Circuit Court of Appeals recently determined that diabetes is a "physical impairment" and then addressed whether that impairment substantially limited a major life activity under the facts of that case. (*Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003).) In finding that the plaintiff had presented evidence that she was substantially limited in eating, the court noted that the plaintiff was required to be vigilant about testing blood

glucose levels and adjusting food intake, insulin and physical activity accordingly. *Id.* at 1040-1041.

Fluctuations in blood glucose levels can impact concentration and comprehension, as well as have significant and potentially life-threatening short and long term health implications. "Helping the Student with Diabetes Succeed- A Guide for School Personnel" U.S. Department of Health and Human Services (2003) at 1 (available at <http://www.cde.ca.gov/ls/he/hn/diabetesmgmt.asp>).

To avoid these fluctuations in blood glucose levels, students with diabetes must be vigilant about balancing food consumption, exercise, and administration of medication. For these reasons, the Office for Civil Rights of the United States Department of Education (OCR) has found that students with diabetes to be "disabled" under Section 504. (See *Bement (IL) Community Unit School District #5*, 14 EHLR 353:383 (OCR 1989) (holding that a student with diabetes is disabled under Section 504 when she required close monitoring of her diet, behavior, and activities at all times in order for her to be able to attend school); *Irvine (CA) Unified Sch. Dist.*, 19 IDELR 883, 884 (OCR 1993) (determining that the student with type 1 diabetes was a "disabled person" as defined by the regulation implementing Section 504).

#### B. 504 Plans

Once a local education agency (LEA) determines that a student is entitled to Section 504 protections, this includes the provision of a free appropriate public education. (34 CFR sec. 104.35.) Services, and accommodations are determined through the 504 planning process, and documented in a 504 plan. *Henderson County (NC) Pub. Schs.*, 34 IDELR 43, 44 (OCR 2000) (voluntary resolution agreement reached to develop Section 504 plan providing for a broad range of diabetes-related aids and services, including training staff to monitor blood glucose, count carbohydrates, manage student's insulin pump, and establish procedures for the provision of appropriate emergency services); *Prince George's County (MD) Schools*, 39 IDELR 103, 104 (OCR 2003) (district required to develop a Section 504 Plan tailored to the individual needs of a student with type 1 diabetes).

Academic modifications may be necessary whether or not the major life activity of "learning" is affected. A student with diabetes may need to have his/her curriculum adapted in a variety of ways such as changes in physical education instruction, in the regular school day schedule (such as breaks required to test for and treat abnormal blood sugar levels), in additional breaks or other time modifications during tests, and in the regular schedule for eating, drinking and toileting. These accommodations should be documented in the 504 plan. Decisions about what health care services a student will receive, including treatment while at school, such as the timing and dosage of insulin to be administered, usually are based on the treating physician's written orders. (See Cal. Ed. Code sec. 49423.) In rare circumstances, the 504 team will question the doctor's treatment plan as being outside standards of care and will seek a second opinion at school

district expense. (See section of this advisory discussing IDEA entitled *Related Services as Including Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI* below.)

### **C. Individualized Inquiries Required; Blanket Policies Prohibited**

An LEA may not have a blanket policy or general practice that insulin or glucagon administration, or other diabetes-related health care services, will only be provided by district personnel at one school in the district or will always require removal from the classroom in order to receive diabetes related health care services. For example, in *Christopher-S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205, 1212 (9th Cir. 2004), the Ninth Circuit Court of Appeals noted that OCR has repeatedly held that blanket policies that preclude individual evaluation of a particular child's educational and health related services needs violate Section 504. (See also *Conejo Valley (CA) Unified Sch. Dist.*, 20 IDELR (LRP) 1276, 1280 (OCR 1993) (district violated Section 504 by failing to perform an evaluation that was individualized by proposing changes in placement based upon a generalized district policy regarding who could perform injections without regard to student's individual education needs); *Irvine (CA) Unified Sch. Dist.*, 23 IDELR 1144, 1146 (OCR 1995) (district's "unwritten policy" prohibiting blood glucose testing in classroom violated 34 CFR sec. 104.35(c)(3) requiring that a team of persons give careful consideration to all of the information available and makes determinations based upon the individual needs of the disabled student).) See further discussion below in the section of this advisory discussing IDEA entitled *Related Services May Include Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI*.

In addition, a school or district may not require the parent or guardian to waive any rights or agree to any particular placement or related services as a condition of administering medications or assisting a student in the administration of medication at school. (*Berlin Brothersvalley (PA.) School Dist.*, EHLR 353:124 (OCR 1988) (district policy of giving school officials discretion in whether to administer needed medication and conditioning the provision of services required by Section 504 or IDEA on parents signing a waiver of liability is prohibited). See further discussion below in the section of this advisory discussing IDEA entitled *School Placement Decisions*.

### **D. FAPE Under Section 504**

Pursuant to 34 CFR section 104.33, school districts must provide a free appropriate public education (FAPE) to all students with disabilities in public elementary and secondary schools. Under Section 504, "appropriate education" means "the provision of regular *or* special education and related aids and services that (i) are designed to meet individual educational needs of

handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 34 CFR sections 104.34, 104.35, and 104.36." (34 CFR section 104.33 (b)(emphasis added).)

The OCR has applied the FAPE obligation broadly to ensure nondiscrimination by providing individual accommodations that provide each disabled student with a FAPE. The requirement to provide FAPE under Section 504 has been applied in the context of the administration of medication in general and diabetes-based related services in particular. (See *Conejo Valley (CA) Unified Sch. Dist.*, *supra*; *Irvine (CA) Unified Sch. Dist.*, *supra*; and *Prince George's County (MD) Schools*, *supra*.) See also, Chapter 4 of *Compliance With The Americans With Disabilities Act: A Self-Evaluation Guide for Public Elementary and Secondary Schools*, Office for Civil Rights Department of Education, United States of America (1995) available at: <http://www.dlrp.org/html/publications/schools/general/guidcont.html> (last visited March 30, 2007) "Unlike the requirement to provide auxiliary aids in contexts other than FAPE ... the obligation to provide related aids and services necessary to the provision of FAPE is not subject to the limitations regarding undue financial and administrative burdens or fundamental alteration of the program." *Id.* at 73.

## **II. California's Anti-Discrimination Statutes and Students with Diabetes Who Require Diabetes Health Related Services During the Day In Order to Safely Attend K-12 Schools in California.**

California's anti-discrimination statutes prohibit discrimination on the basis of disability under any program or activity funded directly by the State. (Cal. Gov. Code sec. 11135(a).) "Disability" means any mental or physical disability as defined by Government Code section 12926. (Cal. Gov. Code sec. 11135(d)(1).) "Physical disability" is defined in Government Code section 12926(k)(1) and (2). It affords broader coverage than Section 504 because it requires a "limitation" rather than a "substantial limitation" of a major life activity. (Cal. Gov. Code secs. 12926(k)(1)(B); 12926.1(c), (d)(2); see generally *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1022-1032.)

In addition, whether a physical disability limits a major life activity under California's statutory scheme must "be determined without regard to mitigating measures such as medications...." (Cal. Gov. Code sec. 12926(k)(1)(B)(i).) This provision has made the Supreme Court's holding in *Sutton v. United Airlines*, 527 U.S. 471 (1999), which required consideration of such mitigating measures inapplicable under California law. Furthermore, section 12926(k)(2) of the Government Code provides that all students with diabetes who require special education or related services (*i.e.*, health-related services) are protected by state anti-discrimination laws. Government Code section 11135 incorporates the rights under the ADA and thus Section 504. (See Gov. Code sec. 11135(b) and 42 USC sec. 12133; 28 CFR sec. 35.103(a)). Therefore, the discussion above regarding Section 504 and students with diabetes is applicable under the broad definitions of physical disability in California.

### III. The IDEA and Students With Diabetes Who Require Diabetes Health Related Services During the Day In Order to Safely Attend K-12 Schools in California.

The primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." (20 USC secs. 1400(d)(1)(A), 1401(a).) California law sets the same standard for educating individuals with exceptional needs as the reauthorized IDEA. (Cal. Ed. Code secs. 56000, 56363(a).)

#### A. Eligibility

The IDEA requires LEAs to conduct "child find" activities to ensure that children with diabetes are identified, located, and evaluated. (20 USC sec. 1412(a)(3).) Under the IDEA, a child with diabetes is evaluated for eligibility under one of the 13 categories of disability, including the disability of "other health impaired" (OHI). (20 USC sec. 1401(3)(A); 34 CFR sec. 300.8; Cal. Ed. Code sec. 56026; Cal. Code Regs., Tit. 5, sec. 3030.) The reauthorized IDEA defines "child with a disability" in the following way:

The term "child with a disability" means a child –

- (i) with ... other health impairments .... and
- (ii) who, by reason thereof, needs special education and related services. (20 USC sec. 1401(3)(A).)

The term "other health impairments" (OHI) is further defined in the recently promulgated regulations as follows:

(c ) *Definitions of disability terms.* The terms used in this definition of a child with a disability are defined as follows:

(9) *Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the education environment, that --

- (i) is due to chronic or acute health problems such as diabetes ... and
- (ii) adversely affects a child's educational performance.

Hence, an individualized education program (IEP) team can determine that a child with diabetes is eligible under the disability of OHI because high or low blood glucose levels can cause symptoms giving him/her limited strength, limited alertness, and creating chronic or acute health problems that adversely affect the student's educational performance. (See "Helping the Student with Diabetes Succeed -- A Guide for School Personnel" ("NDEP Guide") U.S. Department of Health and Human Services, 2003) available via CDE's web site at <http://www.cde.ca.gov/ls/he/hn/diabetesmgmt.asp>. Fluctuations in blood glucose levels may have an adverse effect on education

in a variety of ways, including the effect on concentration, comprehension, and energy levels. It should be noted that the IEP team "must make an individual determination as to whether, notwithstanding the child's progress in a course or grade, he or she needs or continues to need special education and related services." (34 CFR sec. 300.101(c).)

## **B. Special Education Defined**

The IDEA defines "special education" as meaning "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including -

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education." (20 USC section 1401(29).)

"Specially designed instruction" means "adapting, as appropriate to the needs of the eligible child under this part, the content, methodology, or delivery or instruction (i) to address the unique needs of the child that result from the child's disability and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." (34 CFR sec. 300.39(b)(3).)

For example, an IEP team could determine that a child who meets the criteria for eligibility under the category of OHI based upon chronic or acute health problems arising from diabetes would need to have his/her curriculum adapted in ways such as changes in the physical education instruction, in the regular school day schedule (such as various breaks required by abnormal blood sugar levels involving medical treatment), in allowed time for taking tests, in the regular schedule for eating, drinking and toileting, in assignment due dates, and in various other academic adaptations.

## **C. Individualized Education Program**

Determinations about eligibility, special education and related services under the IDEA and relevant state statutes are made generally by the child's Individualized Education Program (IEP) team. (See generally Cal. Ed. Code secs. 56340-56347.) Such determinations are always based upon the unique needs of the individual child.

The term "individualized education program" (IEP) means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with 20 USC section 1414(d). As a part of each IEP, there must be "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and

a statement of the program modifications or supports for school personnel that will be provided for the child...." (20 USC sec. 1414(d)(1)(A)(i)(IV)) in school and in extracurricular and other nonacademic activities. The 2006 implementing regulations are located at 34 CFR sections 300.320 through 300.328.

**D. Related Services May Include Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI**

In general, the reauthorized IDEA includes "school nurse services" as a "related service." (20 USC sec. 1401(26).) The statutory definition was expanded in the regulations to include school health services. (34 CFR sec. 300.34.) California's definition of designated instruction and services/related services is located in Education Code section 56363 and is synonymous with related services in the reauthorized IDEA in 20 USC section 1401(26). California's designated instruction services thus do not deviate from the federal related services.

If a child needs both special education and health services, then, as determined by the child's IEP team, school nurse/health services should be made available to a child with the eligible disability of OHI as documented in the student's IEP. Services related to an OHI-eligible child's diabetes health care needs at school, including those involving the management and administration of insulin, are covered under the IDEA as nursing and health services rather than excluded from coverage as medical services requiring a physician to provide them. (See *Clovis Unified School Dist. v. Office of Administrative Hearings*, 903 F.3d 635, 641-643 (9th Cir. 1990) discussing and applying *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984).)

In California, by statute both a written statement from the child's physician as well as a written statement from the child's parent are required before either a school nurse or other designated school personnel may assist the child with the administration of medication. (Cal. Ed. Code sec. 49423.) Hence, decisions about what health care services a student will receive, including treatment while at school, such as the timing and dosage of insulin to be administered usually are based on the treating physician's written orders. (See Cal. Ed. Code sec. 49423.) In rare circumstances the IEP team will question the doctor's treatment plan as being outside the standard of care and then request clarification from the treating physician or a second opinion with the consent of the parent, at the district's expense. (See 34 CFR sec. 300.300; *Shelby S. ex rel. Kathleen T. v. Conroe Independent School Dist.*, 454 F.3d 450, 454-455 (5th Cir. 2006) (school district authorized to compel medical examination over parent objection and necessity demonstrated).) In addition, the IEP team is responsible for determining educational modifications. (See, *Special Education Defined*, above).

#### **E. Individualized Inquiries Required; Blanket Policies Prohibited**

As with Section 504 determinations discussed above in Part I.C., decisions by IEP teams must be based upon individualized inquiries. The IDEA and its implementing regulations are premised upon the fact that each child is "unique" (20 USC sec. 1400(d)(1)(A)) and must receive an "individualized education program" (20 USC sec. 1401(14); see generally *Porter v. Board of Trustees of Manhattan Beach Unified School Dist.*, 307 F.3d 1064, 1066 (9th Cir. 2002) quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-189 (1982) ("right to public education for students with disabilities 'consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction'").) As a consequence, decisions about a specific child's eligibility for services under the IDEA must not be based upon the generalized or "blanket" policies of a local education agency rather than the unique needs of the individual child. (See Part I.C., *supra*.) Therefore, policies that restrict the availability of health related services across-the-board would be out of compliance with the mandate to individualize decisions about special education and related services needs.

#### **F. School Placement Decisions**

School placement decisions may not be based upon the unwillingness of a district to provide needed related services to a child with OHI-diabetes disability at the school that the child would otherwise attend. A district may not require the parent to waive any rights, hold the district harmless, or agree to any particular placement or related services as a condition of administering medication or assisting a student in the administration of medication at school. (See Comment to IDEA regulations at p. 46587 (federal register) involving 34 CFR sec. 300.116(c): "Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.....Public agencies ....must not make placement decisions based on a public agency's needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff;" see also *Berlin Brothersvalley (PA.) School Dist.*, EHLR 353:124 (OCR 1988) (blanket waiver of liability as condition to provision of medical services prohibited). For example, a district may not have a blanket policy or general practice that insulin or glucagon administration or other diabetes-related health care service are only going to be provided by district personnel at one school in the district, or that a child will always need to be removed from the classroom in order to receive diabetes related health care services. An IEP developed in the legally-required manner, which takes into account all of the relevant medical and education factors under the IDEA for each disabled child, is the only way to ensure that such a student receives an individualized determination of what constitutes FAPE under the IDEA and relevant state statutes.

#### **G. Administrative Procedures; Financial Burden Not a Defense**

A parent of a child with the disability of OHI or an organization can file an administrative complaint with the CDE alleging that a school district is violating the IDEA or relevant state statutes by failing to identify, evaluate, or provide a FAPE to a student with diabetes or a group of students with diabetes, including challenging a district policy or practice that restricts the provision of related health services to students eligible for such services under the IDEA. (34 CFR secs. 300.151-300.153; Calif. Code Regs., Tit. 5, secs. 4600-4671.)

In the alternative, a parent who disagrees with the IEP decision regarding identification, evaluation, or the provision of FAPE and related services can file for an impartial due process hearing with the Office of Administrative Hearings. (20 USC sec. 1415(e)-(i).) An OAH judge can order that the applicable required related school health services be provided by the district, including the administration of insulin during the school day. (20 USC sec. 1415(f)(3)(E).) Financial burden is not a valid defense available to the LEA under the *Garret F.* case. (*Cedar Rapids v. Garret F.*, 526 U.S. 66, 75, fn. 6, 78-79 (1999) (district required to fund related school health services under 34 CFR sec. 300.13(a) where necessary in order to provide student with meaningful access to public school).)

#### **IV. Who May Administer Insulin in California to Students with Diabetes As a Related Service Under Section 504 and the IDEA.**

##### **A. California Law**

It is the position of the CDE that the Business and Professions Code section 2725(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 and parent/guardian;<sup>1</sup>
2. school nurse or school physician employed by the LEA;
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 elects;
6. parent/guardian designee, if parent(/guardian so elects,

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<sup>1</sup> Unlicensed school personnel are authorized under state law to assist students as needed with insulin self-administration. Cal. Ed. Code sec. 49423 provides that unlicensed school personnel may assist with medication administration.

- and
7. who shall be a volunteer who is not an employee of the LEA; unlicensed voluntary school employee with appropriate training, but only in emergencies as defined by Section 2727(d) of the Business and Professions Code (epidemics or public disasters).<sup>2</sup>

## B. Federal Law

As noted above in Parts I and III, federal law under Section 504 and the IDEA provides that the administration of insulin can be determined to be a related service that must be provided to a student pursuant to a Section 504 Plan or an IEP in order to ensure FAPE. CDE has recognized in the regulations which implement Education Code section 49423 regarding the administration of medication to students during the school day that they did not affect "in any way" either the content or implementation of a student's Section 504 Plan or IEP. (Calif. Code Regs., Tit. 5, section 610(d).) Further, CDE's Program Advisory (required by Section 611 of the regulations) recognized that students' rights under Section 504 and the IDEA are distinct from state legal requirements. (See <http://www.cde.ca.gov/ls/he/hn/medadvisory.asp>.)

## C. Reconciliation of State and Federal Law

The difficult issue in this area is reconciling state and federal requirements. Clearly the first set of personnel who are authorized to administer insulin pursuant to a Section 504 Plan or an IEP are those persons who are expressly so authorized under California law, as set forth in Part IV.A, *supra*. The question is what should occur when no expressly authorized school personnel are available.

In CDE's view, the list cannot be taken as exhaustive because LEAs must also meet federal requirements -- even if the personnel expressly authorized by California are not available. In practical terms, this means that the methodology followed by some LEAs of training unlicensed school employees to administer insulin during the school day to a student whose Section 504 Plan or IEP so requires it is a valid practice pursuant to federal

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<sup>2</sup> In such emergency cases, an unlicensed voluntary school employee should have been trained to at least the standards specified by the American Diabetes Association's training slides entitled "Diabetes Care Tasks At School: What Key Personnel Need to know: Insulin Administration" (Attachment A). Such a voluntary school employee should be regularly, and at least quarterly, supervised by a school nurse, physician, or other appropriate individual under contract with the LEA, providing the training, and with emergency communication access to the same school nurse or physician. Documentation of training, ongoing supervision, and annual written verification of competency are strongly recommended, and such documentation should be annually submitted to the LEA employing the unlicensed person by the school nurse or physician.

law. If the LEA determines that insulin administration by the types of persons listed in categories 2-4 are not available or feasible, then unlicensed school employees with appropriate training would be authorized under federal law to administer insulin in accordance with the student's Section 504 Plan or IEP. What is not valid is for an LEA to adopt a general policy or practice that a Section 504 Plan or IEP need not be developed or followed because the LEA is not able to comply with the student's federal rights based upon the express provisions of state law.

When federal and state laws are reconciled, it is clear that it is unlawful for an LEA to have a general practice or policy that asserts that it need not comply with the IDEA or Section 504 rights of a student to have insulin administered at school simply because a licensed professional is unavailable. In such situations, federal rights take precedence over strict adherence to state law so that the educational and health needs of the student protected by the Section 504 Plan or IEP are met.

## **V. Monitoring and Compliance by CDE**

### **A. IDEA**

Under the IDEA, the CDE monitors compliance with federal and state special education statutes and regulations with its Quality Assurance Process (QAP). That process is characterized by the gathering and evaluating of data in order to identify districts and areas within districts to aid in the inquiry, evaluation, and review of compliance issues. This enables the LEA and the CDE to develop corrective action plans, program improvement goals, and provide technical assistance to improve services to special education students throughout California.

Pursuant to the *K.C. Settlement Agreement*, the CDE has agreed to modify its QAP monitoring instruments and process to include special evaluation items related to students with the disability of OHI with chronic or acute health problems arising from diabetes.

The CDE also assures compliance under the IDEA by maintaining an administrative complaints system as required by federal regulation. (See 34 CFR sections 300.151-300.153.) Under 34 CFR section 300.153(a), a complainant can be either an organization or an individual who files a signed written complaint alleging any violation concerning identification, evaluation, placement, or the provision of a FAPE in the least restrictive environment including the provision related services. For example, a complaint may allege policies and/or practices that violated the child's right to receive an individualized assessment or eligibility and/or the provision of diabetes related health care services pursuant to the IEP process and/or any dispute arising out of the IEP process.

The required elements of a complaint are set forth in 34 CFR section 300.153(b). Of particular note is the requirement that a complaint alleging child-specific issues must contain the name and address of the residence of the child (34 CFR sec. 300.153(b)(4)(a).) Complaints of a systemic nature under the IDEA do not need to identify the individual student by name, although they still must provide facts of the alleged violation that are sufficient for the CDE or the district to conduct an effective investigation, and they must be signed.

#### **B. Section 504/State Statutes**

As required by the Uniform Complaints Procedure, CDE's Office of Equal Opportunity will continue to accept and investigate complaints pursuant to Section 504 and Government Code section 11135 which are filed by an organization or a student with a disability that alleges individual or systemic discrimination arising from an alleged non-compliant policy or practice or the failure to provide diabetes-related health services, reasonable accommodations or modifications to the student's educational program. (See Chapter 5.1, the Uniform Complaint Procedures (Sections 4600-4670) and Chapter 5.3, involving Nondiscrimination and Educational Equity, Sections 4900-4965.)

#### **VI. Impartial Due Process Hearings**

Parents who disagree with a school district's decisions regarding their child's eligibility and/or placement under the IDEA also have a federal right to request a due process mediation and/or hearing. (20 USC sec. 1415.) Procedural rights to an impartial hearing provided by the local district if a parent disagrees with a Section 504 team decision are also required by federal law. (34 CFR sec. 104.36.)

#### **VII. Resources**

CDE recommends that local education agencies and SELPAs use the following documents as guidelines for compliance: *Program Advisory on Medication Administration* (California State Board of Education, 2005) available via CDE's Web site at <http://www.cde.ca.gov/ls/he/hn/mediadvisory.asp>; *Sample Section 504 Plan* and *Diabetes Medical Management Plan* ("DMMP"), both available at <http://www.diabetes.org/advocacy-and-legalresources/discrimination/school/504plan.jsp> and *Helping the Student with Diabetes Succeed -- A Guide for School Personnel* ("NDEP Guide") U.S. Department of Health and Human Services, 2003) available via CDE's website at <http://www.cde.ca.gov/ls/he/hn/diabetesmgmt.asp>.

**Checklist: Who May Administer Insulin in California's Schools  
Pursuant to An IEP or a Section 504 Plan**

Business and Professions Code section 2725(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 and parent/guardian;
2. school nurse or school physician employed by the LEA;
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(d) of the Business and Professions Code (epidemics or public disasters).<sup>3</sup>

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.

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<sup>3</sup> In such emergency cases, an unlicensed voluntary school employee should have been trained to at least the standards specified by the American Diabetes Association's training slides entitled "Diabetes Care Tasks At School: What Key Personnel Need to know: Insulin Administration" available at <http://diabetes.org/advocacy-and-legalresources/discrimination/school/schooltraining.jsp>. Such a voluntary school employee should be regularly, and at least quarterly, supervised by a school nurse, physician, or other appropriate individual under contract with the LEA, providing the training, and with emergency communication access to the same school nurse or physician. Documentation of training, ongoing supervision, and annual written verification of competency are strongly recommended, and such documentation should be annually submitted to the LEA employing the unlicensed person by the school nurse or physician.

# EXHIBIT 2

## EXHIBIT A

### LEGAL ADVISORY ON RIGHTS OF STUDENTS WITH DIABETES IN CALIFORNIA'S K-12 PUBLIC SCHOOLS

Pursuant to the recent Settlement Agreement in *K.C. et al. v. Jack O'Connell, et al.*, Case No. C-05-4077 MMC, in the United States District Court for the Northern District of California, the California Department of Education (CDE) has agreed to remind all California school districts and charter schools of the following important legal rights involving students with diabetes who have been determined to be eligible for services under either the Individuals with Disabilities Education Act (IDEA) and related California law or Section 504 of the Rehabilitation Act of 1973 (Section 504) and related California law.

The CDE notes that this is a complex area of the law. Every effort has been made to be clear and concise in providing this advisory.

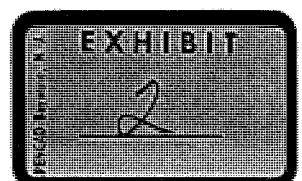
#### I. **The Applicability of Two Federal Anti-Discrimination Statutes (Section 504 and the ADA) to those Public School Students with Diabetes Who Require Diabetes Health Related Services While Attending K-12 Schools in California.**

Two federal anti-discrimination statutes, Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 (ADA), together establish rights for eligible students with diabetes in California's public schools. Together, they serve to protect such students from discrimination based upon their disability including the right to receive a free appropriate public education (FAPE). The two statutory schemes are treated synonymously. (*Wong v. Regents of University of California*, 192 F.3d 807, 816 n. 26.) Hence, in this Legal Advisory, Section 504 will mean both Section 504 as well as the ADA unless otherwise noted.

##### A. **Eligibility**

In general, a student will be determined to have a disability under Section 504 if he/she has a mental or physical impairment that substantially limits one or more major life activities, such as eating, breathing, caring for oneself, performing manual tasks, hearing, speaking, walking, and learning. (See 34 CFR sec. 104.4, subs. (j), (k), and (i).) Accordingly, learning is not the only major life activity that must be considered when determining eligibility under Section 504. (*Rock Hill (OH) Local Schools*, 37 IDELR 222 (OCR 2002).)

The Ninth Circuit Court of Appeals recently determined that diabetes is a "physical impairment" and then addressed whether that impairment substantially limited a major life activity under the facts of that case. (*Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003).) In finding that the plaintiff had presented evidence that she was substantially limited in eating, the court noted that the plaintiff was required to be vigilant about testing blood



glucose levels and adjusting food intake, insulin and physical activity accordingly. *Id.* at 1040-1041.

Fluctuations in blood glucose levels can impact concentration and comprehension, as well as have significant and potentially life-threatening short and long term health implications. "Helping the Student with Diabetes Succeed- A Guide for School Personnel" U.S. Department of Health and Human Services (2003) at 1 (available at <http://www.cde.ca.gov/ls/he/hn/diabetesmgmt.asp>).

To avoid these fluctuations in blood glucose levels, students with diabetes must be vigilant about balancing food consumption, exercise, and administration of medication. For these reasons, the Office for Civil Rights of the United States Department of Education (OCR) has found that students with diabetes to be "disabled" under Section 504. (See *Bement (IL) Community Unit School District #5*, 14 EHLR 353:383 (OCR 1989) (holding that a student with diabetes is disabled under Section 504 when she required close monitoring of her diet, behavior, and activities at all times in order for her to be able to attend school); *Irvine (CA) Unified Sch. Dist.*, 19 IDELR 883, 884 (OCR 1993) (determining that the student with type 1 diabetes was a "disabled person" as defined by the regulation implementing Section 504).

## B. 504 Plans

Once a local education agency (LEA) determines that a student is entitled to Section 504 protections, this includes the provision of a free appropriate public education. (34 CFR sec. 104.35.) Services, and accommodations are determined through the 504 planning process, and documented in a 504 plan. *Henderson County (NC) Pub. Schs.*, 34 IDELR 43, 44 (OCR 2000) (voluntary resolution agreement reached to develop Section 504 plan providing for a broad range of diabetes-related aids and services, including training staff to monitor blood glucose, count carbohydrates, manage student's insulin pump, and establish procedures for the provision of appropriate emergency services); *Prince George's County (MD) Schools*, 39 IDELR 103, 104 (OCR 2003) (district required to develop a Section 504 Plan tailored to the individual needs of a student with type 1 diabetes).

Academic modifications may be necessary whether or not the major life activity of "learning" is affected. A student with diabetes may need to have his/her curriculum adapted in a variety of ways such as changes in physical education instruction, in the regular school day schedule (such as breaks required to test for and treat abnormal blood sugar levels), in additional breaks or other time modifications during tests, and in the regular schedule for eating, drinking and toileting. These accommodations should be documented in the 504 plan. Decisions about what health care services a student will receive, including treatment while at school, such as the timing and dosage of insulin to be administered, usually are based on the treating physician's written orders. (See Cal. Ed. Code sec. 49423.) In rare circumstances, the 504 team will question the doctor's treatment plan as being outside standards of care and will seek a second opinion at school

district expense. (See section of this advisory discussing IDEA entitled *Related Services as Including Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI* below.)

### **C. Individualized Inquiries Required; Blanket Policies Prohibited**

An LEA may not have a blanket policy or general practice that insulin or glucagon administration, or other diabetes-related health care services, will only be provided by district personnel at one school in the district or will always require removal from the classroom in order to receive diabetes related health care services. For example, in *Christopher S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205, 1212 (9th Cir. 2004), the Ninth Circuit Court of Appeals noted that OCR has repeatedly held that blanket policies that preclude individual evaluation of a particular child's educational and health related services needs violate Section 504. (See also *Conejo Valley (CA) Unified Sch. Dist.*, 20 IDELR (LRP) 1276, 1280 (OCR 1993) (district violated Section 504 by failing to perform an evaluation that was individualized by proposing changes in placement based upon a generalized district policy regarding who could perform injections without regard to student's individual education needs); *Irvine (CA) Unified Sch. Dist.*, 23 IDELR 1144, 1146 (OCR 1995) (district's "unwritten policy" prohibiting blood glucose testing in classroom violated 34 CFR sec. 104.35(c)(3) requiring that a team of persons give careful consideration to all of the information available and makes determinations based upon the individual needs of the disabled student).) See further discussion below in the section of this advisory discussing IDEA entitled *Related Services May Include Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI*.

In addition, a school or district may not require the parent or guardian to waive any rights or agree to any particular placement or related services as a condition of administering medications or assisting a student in the administration of medication at school. (*Berlin Brothersvalley (PA.) School Dist.*, EHLR 353:124 (OCR 1988) (district policy of giving school officials discretion in whether to administer needed medication and conditioning the provision of services required by Section 504 or IDEA on parents signing a waiver of liability is prohibited). See further discussion below in the section of this advisory discussing IDEA entitled *School Placement Decisions*.

### **D. FAPE Under Section 504**

Pursuant to 34 CFR section 104.33, school districts must provide a free appropriate public education (FAPE) to all students with disabilities in public elementary and secondary schools. Under Section 504, "appropriate education" means "the provision of regular *or* special education and related aids and services that (i) are designed to meet individual educational needs

of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 34 CFR sections 104.34, 104.35, and 104.36." (34 CFR section 104.33 (b)(emphasis added).)

The OCR has applied the FAPE obligation broadly to ensure nondiscrimination by providing individual accommodations that provide each disabled student with a FAPE. The requirement to provide FAPE under Section 504 has been applied in the context of the administration of medication in general and diabetes-based related services in particular. (See *Conejo Valley (CA) Unified Sch. Dist.*, *supra*; *Irvine (CA) Unified Sch. Dist.*, *supra*; and *Prince George's County (MD) Schools*, *supra*.) See also, Chapter 4 of *Compliance With The Americans With Disabilities Act: A Self-Evaluation Guide for Public Elementary and Secondary Schools*, Office for Civil Rights Department of Education, United States of America (1995) available at: <http://www.dlrp.org/html/publications/schools/general/guidcont.html> (last visited March 30, 2007) "Unlike the requirement to provide auxiliary aids in contexts other than FAPE ... the obligation to provide related aids and services necessary to the provision of FAPE is not subject to the limitations regarding undue financial and administrative burdens or fundamental alteration of the program." *Id.* at 73.

## II. California's Anti-Discrimination Statutes and Students with Diabetes Who Require Diabetes Health Related Services During the Day In Order to Safely Attend K-12 Schools in California.

California's anti-discrimination statutes prohibit discrimination on the basis of disability under any program or activity funded directly by the State. (Cal. Gov. Code sec. 11135(a).) "Disability" means any mental or physical disability as defined by Government Code section 12926. (Cal. Gov. Code sec. 11135(d)(1).) "Physical disability" is defined in Government Code section 12926(k)(1) and (2). It affords broader coverage than Section 504 because it requires a "limitation" rather than a "substantial limitation" of a major life activity. (Cal. Gov. Code secs. 12926(k)(1)(B); 12926.1(c), (d)(2); see generally *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1022-1032.)

In addition, whether a physical disability limits a major life activity under California's statutory scheme must "be determined without regard to mitigating measures such as medications...." (Cal. Gov. Code sec. 12926(k)(1)(B)(i).) This provision has made the Supreme Court's holding in *Sutton v. United Airlines*, 527 U.S. 471 (1999), which required consideration of such mitigating measures inapplicable under California law. Furthermore, section 12926(k)(2) of the Government Code provides that all students with diabetes who require special education or related services (*i.e.*, health-related services) are protected by state anti-discrimination laws.

Government Code section 11135 incorporates the rights under the ADA and thus Section 504. (See Gov. Code sec. 11135(b) and 42 USC sec. 12133; 28 CFR sec. 35.103(a)). Therefore, the discussion above regarding Section 504 and students with diabetes is applicable under the broad definitions of physical disability in California.

### III. The IDEA and Students With Diabetes Who Require Diabetes Health Related Services During the Day In Order to Safely Attend K-12 Schools in California.

The primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." (20 USC secs. 1400(d)(1)(A), 1401(a).) California law sets the same standard for educating individuals with exceptional needs as the reauthorized IDEA. (Cal. Ed. Code secs. 56000, 56363(a).)

#### A. Eligibility

The IDEA requires LEAs to conduct "child find" activities to ensure that children with diabetes are identified, located, and evaluated. (20 USC sec. 1412(a)(3).) Under the IDEA, a child with diabetes is evaluated for eligibility under one of the 13 categories of disability, including the disability of "other health impaired" (OHI). (20 USC sec. 1401(3)(A); 34 CFR sec. 300.8; Cal. Ed. Code sec. 56026; Cal. Code Regs., Tit. 5, sec. 3030.) The reauthorized IDEA defines "child with a disability" in the following way:

The term "child with a disability" means a child –

- (i) with ... other health impairments .... and
- (ii) who, by reason thereof, needs special education and related services. (20 USC sec. 1401(3)(A).)

The term "other health impairments" (OHI) is further defined in the recently promulgated regulations as follows:

(c ) *Definitions of disability terms.* The terms used in this definition of a child with a disability are defined as follows:

(9) *Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the education environment, that --

- (i) is due to chronic or acute health problems such as diabetes ... and
- (ii) adversely affects a child's educational performance.

Hence, an individualized education program (IEP) team can determine that a child with diabetes is eligible under the disability of OHI because high or low blood glucose levels can cause symptoms giving him/her limited strength, limited alertness, and creating chronic or acute health problems that adversely affect the student's educational performance. (See "Helping the Student with Diabetes Succeed -- A Guide for School Personnel" ("NDEP Guide") U.S. Department of Health and Human Services, 2003) available via CDE's web site at <http://www.cde.ca.gov/ls/he/hn/diabetesmgmt.asp>. Fluctuations in blood glucose levels may have an adverse effect on

education in a variety of ways, including the effect on concentration, comprehension, and energy levels. It should be noted that the IEP team "must make an individual determination as to whether, notwithstanding the child's progress in a course or grade, he or she needs or continues to need special education and related services." (34 CFR sec. 300.101(c).)

## **B. Special Education Defined**

The IDEA defines "special education" as meaning "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including –

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education." (20 USC section 1401(29).)

"Specially designed instruction" means "adapting, as appropriate to the needs of the eligible child under this part, the content, methodology, or delivery or instruction (i) to address the unique needs of the child that result from the child's disability and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." (34 CFR sec. 300.39(b)(3).)

For example, an IEP team could determine that a child who meets the criteria for eligibility under the category of OHI based upon chronic or acute health problems arising from diabetes would need to have his/her curriculum adapted in ways such as changes in the physical education instruction, in the regular school day schedule (such as various breaks required by abnormal blood sugar levels involving medical treatment), in allowed time for taking tests, in the regular schedule for eating, drinking and toileting, in assignment due dates, and in various other academic adaptations.

## **C. Individualized Education Program**

Determinations about eligibility, special education and related services under the IDEA and relevant state statutes are made generally by the child's Individualized Education Program (IEP) team. (See generally Cal. Ed. Code secs. 56340-56347.) Such determinations are always based upon the unique needs of the individual child.

The term "individualized education program" (IEP) means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with 20 USC section 1414(d). As a part of each IEP, there must be "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and

a statement of the program modifications or supports for school personnel that will be provided for the child...." (20 USC sec. 1414(d)(1)(A)(i)(IV)) in school and in extracurricular and other nonacademic activities. The 2006 implementing regulations are located at 34 CFR sections 300.320 through 300.328.

**D. Related Services May Include Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI**

In general, the reauthorized IDEA includes "school nurse services" as a "related service." (20 USC sec. 1401(26).) The statutory definition was expanded in the regulations to include school health services. (34 CFR sec. 300.34.) California's definition of designated instruction and services/related services is located in Education Code section 56363 and is synonymous with related services in the reauthorized IDEA in 20 USC section 1401(26). California's designated instruction services thus do not deviate from the federal related services.

If a child needs both special education and health services, then, as determined by the child's IEP team, school nurse/health services should be made available to a child with the eligible disability of OHI as documented in the student's IEP. Services related to an OHI-eligible child's diabetes health care needs at school, including those involving the management and administration of insulin, are covered under the IDEA as nursing and health services rather than excluded from coverage as medical services requiring a physician to provide them. (See *Clovis Unified School Dist. v. Office of Administrative Hearings*, 903 F.3d 635, 641-643 (9th Cir. 1990) discussing and applying *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984).)

In California, by statute both a written statement from the child's physician as well as a written statement from the child's parent are required before either a school nurse or other designated school personnel may assist the child with the administration of medication. (Cal. Ed. Code sec. 49423.) Hence, decisions about what health care services a student will receive, including treatment while at school, such as the timing and dosage of insulin to be administered usually are based on the treating physician's written orders. (See Cal. Ed. Code sec. 49423.) In rare circumstances the IEP team will question the doctor's treatment plan as being outside the standard of care and then request clarification from the treating physician or a second opinion with the consent of the parent, at the district's expense. (See 34 CFR sec. 300.300; *Shelby S. ex rel. Kathleen T. v. Conroe Independent School Dist.*, 454 F.3d 450, 454-455 (5th Cir. 2006) (school district authorized to compel medical examination over parent objection and necessity demonstrated).) In addition, the IEP team is responsible for determining educational modifications. (See, *Special Education Defined*, above).

#### **E. Individualized Inquiries Required; Blanket Policies Prohibited**

As with Section 504 determinations discussed above in Part I.C., decisions by IEP teams must be based upon individualized inquiries. The IDEA and its implementing regulations are premised upon the fact that each child is "unique" (20 USC sec. 1400(d)(1)(A)) and must receive an "individualized education program" (20 USC sec. 1401(14); see generally *Porter v. Board of Trustees of Manhattan Beach Unified School Dist.*, 307 F.3d 1064, 1066 (9th Cir. 2002) quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-189 (1982) ("right to public education for students with disabilities 'consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction'").) As a consequence, decisions about a specific child's eligibility for services under the IDEA must not be based upon the generalized or "blanket" policies of a local education agency rather than the unique needs of the individual child. (See Part I.C., *supra*.) Therefore, policies that restrict the availability of health related services across-the-board would be out of compliance with the mandate to individualize decisions about special education and related services needs.

#### **F. School Placement Decisions**

School placement decisions may not be based upon the unwillingness of a district to provide needed related services to a child with OHI-diabetes disability at the school that the child would otherwise attend. A district may not require the parent to waive any rights, hold the district harmless, or agree to any particular placement or related services as a condition of administering medication or assisting a student in the administration of medication at school. (See Comment to IDEA regulations at p. 46587 (federal register) involving 34 CFR sec. 300.116(c): "Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.....Public agencies ....must not make placement decisions based on a public agency's needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff;" see also *Berlin Brothersvalley (PA.) School Dist.*, EHLR 353:124 (OCR 1988) (blanket waiver of liability as condition to provision of medical services prohibited). For example, a district may not have a blanket policy or general practice that insulin or glucagon administration or other diabetes-related health care service are only going to be provided by district personnel at one school in the district, or that a child will always need to be removed from the classroom in order to receive diabetes related health care services. An IEP developed in the legally-required manner, which takes into account all of the relevant medical and education factors under the IDEA for each disabled child, is the only way to ensure that such a student receives an individualized determination of what constitutes FAPE under the IDEA and relevant state statutes.

## **G. Administrative Procedures; Financial Burden Not a Defense**

A parent of a child with the disability of OHI or an organization can file an administrative complaint with the CDE alleging that a school district is violating the IDEA or relevant state statutes by failing to identify, evaluate, or provide a FAPE to a student with diabetes or a group of students with diabetes, including challenging a district policy or practice that restricts the provision of related health services to students eligible for such services under the IDEA. (34 CFR secs. 300.151-300.153; Calif. Code Regs., Tit. 5, secs. 4600-4671.)

In the alternative, a parent who disagrees with the IEP decision regarding identification, evaluation, or the provision of FAPE and related services can file for an impartial due process hearing with the Office of Administrative Hearings. (20 USC sec. 1415 (e)-(i).) An OAH judge can order that the applicable required related school health services be provided by the district, including the administration of insulin during the school day. (20 USC sec. 1415(f)(3)(E).) Financial burden is not a valid defense available to the LEA under the *Garret F.* case. (*Cedar Rapids v. Garret F.*, 526 U.S. 66, 75, fn. 6, 78-79 (1999) (district required to fund related school health services under 34 CFR sec. 300.13(a) where necessary in order to provide student with meaningful access to public school).)

## **IV. Who May Administer Insulin in California to Students with Diabetes As a Related Service Under Section 504 and the IDEA.**

### **A. California Law**

It is the position of the CDE that the Business and Professions Code section 2725(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 and parent/guardian;<sup>1</sup>
2. school nurse or school physician employed by the LEA;
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 elects;

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<sup>1</sup> Unlicensed school personnel are authorized under state law to assist students as needed with insulin self-administration. Cal. Ed. Code sec. 49423 provides that unlicensed school personnel may assist with medication administration.

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(d) of the Business and Professions Code (epidemics or public disasters).<sup>2</sup>

#### **B. Federal Law**

As noted above in Parts I and III, federal law under Section 504 and the IDEA provides that the administration of insulin can be determined to be a related service that must be provided to a student pursuant to a Section 504 Plan or an IEP in order to ensure FAPE. CDE has recognized in the regulations which implement Education Code section 49423 regarding the administration of medication to students during the school day that they did not affect "in any way" either the content or implementation of a student's Section 504 Plan or IEP. (Calif. Code Regs., Tit. 5, section 610(d).) Further, CDE's Program Advisory (required by Section 611 of the regulations) recognized that students' rights under Section 504 and the IDEA are distinct from state legal requirements. (See <http://www.cde.ca.gov/ls/he/hn/medadvisory.asp>.)

#### **C. Reconciliation of State and Federal Law**

The difficult issue in this area is reconciling state and federal requirements. Clearly the first set of personnel who are authorized to administer insulin pursuant to a Section 504 Plan or an IEP are those persons who are expressly so authorized under California law, as set forth in Part IV.A, *supra*. The question is what should occur when no expressly authorized school personnel are available.

In CDE's view, the list cannot be taken as exhaustive because LEAs must also meet federal requirements -- even if the personnel expressly authorized by California are not available. In practical terms, this means that the methodology followed by some LEAs of training unlicensed school employees to administer insulin during the school day to a student whose

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<sup>2</sup> In such emergency cases, an unlicensed voluntary school employee should have been trained to at least the standards specified by the American Diabetes Association's training slides entitled "Diabetes Care Tasks At School: What Key Personnel Need to know: Insulin Administration" (Attachment A). Such a voluntary school employee should be regularly, and at least quarterly, supervised by a school nurse, physician, or other appropriate individual under contract with the LEA, providing the training, and with emergency communication access to the same school nurse or physician. Documentation of training, ongoing supervision, and annual written verification of competency are strongly recommended, and such documentation should be annually submitted to the LEA employing the unlicensed person by the school nurse or physician.

Section 504 Plan or IEP so requires it is a valid practice pursuant to federal law. If the LEA determines that insulin administration by the types of persons listed in categories 2-4 are not available or feasible, then unlicensed school employees with appropriate training would be authorized under federal law to administer insulin in accordance with the student's Section 504 Plan or IEP. What is not valid is for an LEA to adopt a general policy or practice that a Section 504 Plan or IEP need not be developed or followed because the LEA is not able to comply with the student's federal rights based upon the express provisions of state law.

When federal and state laws are reconciled, it is clear that it is unlawful for an LEA to have a general practice or policy that asserts that it need not comply with the IDEA or Section 504 rights of a student to have insulin administered at school simply because a licensed professional is unavailable. In such situations, federal rights take precedence over strict adherence to state law so that the educational and health needs of the student protected by the Section 504 Plan or IEP are met.

## **V. Monitoring and Compliance by CDE**

### **A. IDEA**

Under the IDEA, the CDE monitors compliance with federal and state special education statutes and regulations with its Quality Assurance Process (QAP). That process is characterized by the gathering and evaluating of data in order to identify districts and areas within districts to aid in the inquiry, evaluation, and review of compliance issues. This enables the LEA and the CDE to develop corrective action plans, program improvement goals, and provide technical assistance to improve services to special education students throughout California.

Pursuant to the *K.C. Settlement Agreement*, the CDE has agreed to modify its QAP monitoring instruments and process to include special evaluation items related to students with the disability of OHI with chronic or acute health problems arising from diabetes.

The CDE also assures compliance under the IDEA by maintaining an administrative complaints system as required by federal regulation. (See 34 CFR sections 300.151-300.153.) Under 34 CFR section 300.153(a), a complainant can be either an organization or an individual who files a signed written complaint alleging any violation concerning identification, evaluation, placement, or the provision of a FAPE in the least restrictive environment including the provision related services. For example, a complaint may allege policies and/or practices that violated the child's right to receive an individualized assessment or eligibility and/or the provision of diabetes related health care services pursuant to the IEP process and/or any dispute arising out of the IEP process.

The required elements of a complaint are set forth in 34 CFR section 300.153(b). Of particular note is the requirement that a complaint alleging child-specific issues must contain the name and address of the residence of the child (34 CFR sec. 300.153(b)(4)(a).) Complaints of a systemic nature under the IDEA do not need to identify the individual student by name, although they still must provide facts of the alleged violation that are sufficient for the CDE or the district to conduct an effective investigation, and they must be signed.

#### **B. Section 504/State Statutes**

As required by the Uniform Complaints Procedure, CDE's Office of Equal Opportunity will continue to accept and investigate complaints pursuant to Section 504 and Government Code section 11135 which are filed by an organization or a student with a disability that alleges individual or systemic discrimination arising from an alleged non-compliant policy or practice or the failure to provide diabetes-related health services, reasonable accommodations or modifications to the student's educational program. (See Chapter 5.1, the Uniform Complaint Procedures (Sections 4600-4670) and Chapter 5.3, involving Nondiscrimination and Educational Equity, Sections 4900-4965.)

#### **VI. Impartial Due Process Hearings**

Parents who disagree with a school district's decisions regarding their child's eligibility and/or placement under the IDEA also have a federal right to request a due process mediation and/or hearing. (20 USC sec. 1415.) Procedural rights to an impartial hearing provided by the local district if a parent disagrees with a Section 504 team decision are also required by federal law. (34 CFR sec. 104.36.)

#### **VII. Resources**

CDE recommends that local education agencies and SELPAs use the following documents as guidelines for compliance: *Program Advisory on Medication Administration* (California State Board of Education, 2005) available via CDE's Web site at <http://www.cde.ca.gov/ls/he/hn/mediadvisory.asp>; *Sample Section 504 Plan* and *Diabetes Medical Management Plan ("DMMP")*, both available at <http://www.diabetes.org/advocacy-and-legalresources/discrimination/school/504plan.jsp> and *Helping the Student with Diabetes Succeed -- A Guide for School Personnel ("NDEP Guide")* U.S. Department of Health and Human Services, 2003) available via CDE's website at <http://www.cde.ca.gov/ls/he/hn/diabetesmgmt.asp>.

**Checklist: Who May Administer Insulin in California's Schools**  
**Pursuant to An IEP or a Section 504 Plan**

Business and Professions Code section 2725(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 and parent/guardian;
2. school nurse or school physician employed by the LEA;
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(d) of the Business and Professions Code (epidemics or public disasters).<sup>3</sup>

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.

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<sup>3</sup> In such emergency cases, an unlicensed voluntary school employee should have been trained to at least the standards specified by the American Diabetes Association's training slides entitled "Diabetes Care Tasks At School: What Key Personnel Need to know: Insulin Administration" available at <http://diabetes.org/advocacy-and-legalresources/discrimination/school/schooltraining.jsp>. Such a voluntary school employee should be regularly, and at least quarterly, supervised by a school nurse, physician, or other appropriate individual under contract with the LEA, providing the training, and with emergency communication access to the same school nurse or physician. Documentation of training, ongoing supervision, and annual written verification of competency are strongly recommended, and such documentation should be annually submitted to the LEA employing the unlicensed person by the school nurse or physician.