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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

PETITIONERS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN REPLY TO BRIEFS IN  
OPPOSITION TO VERIFIED  
SECOND AMENDED PETITION  
FOR WRIT OF MANDATE AND  
COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

Date: November 14, 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 SCHOOL  
3 NURSES ORGANIZATION (“CSNO”) and CALIFORNIA NURSES ASSOCIATION  
4 (“CNA”) (collectively “Petitioners”) respectfully submit the following Memorandum of Points  
5 and Authorities in Reply to each and both of the Briefs in Opposition to their Verified Second  
6 Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief.

7 I.     INTRODUCTION.

8           The memoranda filed by Respondents Jack O’Connell, State Superintendent of Public  
9 Instruction (“O’Connell”) and California Department of Education (“CDE”) (collectively  
10 “Respondents”) and Intervenor American Diabetes Association (“Intervenor”) in opposition to  
11 Petitioners’ Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief  
12 (together the “Opposition Briefs”) are fundamentally flawed and legally insufficient to prevail in  
13 this case. The Opposition Briefs contain numerous misinterpretations and improper applications  
14 of law and much incorrect legal analysis. Furthermore, the Opposition Briefs rely upon  
15 declarations that strive to create factual disputes in a case that involves solely questions of law,  
16 and are thinly veiled attempts to divert the Court’s attention from the dispositive legal issues in  
17 this case.<sup>1</sup>

18           The most significant specious arguments advanced by Respondents and Intervenor in  
19 their briefs are:

- 20           1.     Respondents were not required to comply with the California Administrative  
21                 Procedure Act (“APA”);
- 22           2.     California law permits unlicensed personnel to administer insulin in California’s  
23                 public schools;

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24  
25 <sup>1</sup> A great deal of the evidence submitted by Respondents and Intervenor in support of their  
26 Opposition Briefs is objectionable and Petitioners will subsequently file the appropriate  
27 objections. Petitioners will not, however, refute the many factually inaccurate statements as  
28 they are legally irrelevant for purposes of this writ. Even assuming, arguendo, that the  
“factual” and “opinion” evidence submitted in support of the Opposition Briefs is true, it is  
immaterial to this action because Petitioners are entitled to writ, declaratory and injunctive  
relief solely on legal grounds.

- 1           3.     Assisting an individual with medication is the same as administering medication;
- 2           4.     A conflict exists between state and federal law in this case; and
- 3           5.     The only way to ensure that diabetic pupils receive a free, appropriate education
- 4                 in the least restrictive environment is to reinterpret and, in essence, rewrite
- 5                 existing California law.

6           As Petitioners demonstrate herein, these arguments are without merit and Petitioners are  
7 entitled to writ, declaratory and injunctive relief, as requested.<sup>2</sup>

8 II.     ARGUMENT.

- 9           A.     The Legal Advisory is a regulation enacted in violation of the Administrative  
10                 Procedure Act and is, therefore, unenforceable.

11           Respondents make a half-hearted attempt to dispute that the Legal Advisory is a  
12 regulation as defined by the APA. Yet, the APA clearly defines “regulation” to include “every  
13 rule, regulation, order or standard of general application or the amendment, supplement, or  
14 revision of any rule, regulation, order or standard adopted by any state agency to implement,  
15 interpret, or make specific the law enforced or administered by it, or to govern its procedure.”  
16 Cal. Gov. Code § 11342.600. Here, the Legal Advisory is a regulation subject to the APA  
17 because, among other reasons, it purports to be a standard of general application.

18           Accordingly, Respondents had a mandatory ministerial duty to comply with the  
19 requirements of the APA, unless an exemption excuses their non-compliance. Exemptions are  
20 set for in California Government Code section 11340.9 and, despite Respondents’ incorrect  
21 arguments to the contrary, no exemption applies.

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25 \_\_\_\_\_  
26 <sup>2</sup> Intervenor improperly argues that Petitioners’ Brief seeks broader relief than requested in  
27 their Verified Second Amended Petition. This is incorrect as Petitioners explicitly  
28 challenged the Legal Advisory as a whole (on grounds it was issued in violation of the APA)  
and standard #8 specifically (on grounds it was issued in violation of the APA and violated  
applicable state laws). See Verified Second Amended Petition ¶¶ 27-56.

1           1.     The Legal Advisory is not an agency interpretation distributed to “advise”  
2                     interested parties about the requirements of state law.

3           Respondents claim that California Code of Regulations, Title 5, section 611 (“Section  
4 611”) applies to excuse their non-compliance with the rulemaking requirements of the APA in  
5 this case. Section 611 allows the CDE to provide non-binding guidance on the administration  
6 and assistance of administration of medication to pupils. Respondents’ argument contains two  
7 primary flaws.

8           As Respondents admit, the Legal Advisory does not include the required written  
9 notification that it is merely exemplary, nor does it state that compliance is not mandatory.  
10 Respondents’ Opp. Brief at 26:27-27:1; see Cal. Code Reg., Title 5, § 611 (requiring that the  
11 advisory include “written notification that the guideline is merely exemplary and that compliance  
12 with the guideline is not mandatory”). The Legal Advisory is devoid of any such language or  
13 suggestion.

14           Most importantly, however, the Legal Advisory is “mandatory.” The Legal Advisory  
15 makes it “mandatory” to allow non-licensed school personnel to administer insulin to school  
16 children in certain circumstances. Certainly, if a school refused to permit the administration of  
17 insulin by non-licensed school personnel during the prescribed situations, Respondents would  
18 conclude that the school violated state law. In fact, the Legal Advisory could not be anything  
19 other than mandatory as it was the basis for the settlement of the K.C. litigation. Of course,  
20 Respondents intend to enforce it to comply with the terms of the settlement. Accordingly,  
21 Section 611 does not apply.<sup>3</sup>

22           Likewise, the Legal Advisory is not exempt from the requirements of the APA as an  
23 interpretation of state law that an agency advances in litigation or in advice letters. As  
24

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25 <sup>3</sup> The narrow exemption of California Government Code section 11340.9(i) also does not  
26 apply in this case. Section 11340.9(i) only applies to a “regulation that is directed to a  
27 specifically named person or to a group of persons and does not apply generally throughout  
28 the state.” In this case, the Legal Advisory was directed to all schools and is intended to  
apply generally throughout the state. It was not directed to a specifically named person or  
group of persons.

1 Respondents correctly point out in their brief, that exemption only applies where the advice is  
2 made to private parties and is nothing more than a “restatement or summary, without  
3 commentary, of the agency’s prior decision in specific cases and its prior advice letters.” See  
4 Respondents’ Opp. Brief at 27:20-28:14 (citing Tidewater Marine W., Inc. v. Bradshaw, 14 Cal.  
5 4th 557, 571 (1996)). The Legal Advisory at issue in this case was published to every local  
6 school district, not simply to a private party or the parties to the underlying litigation. Moreover,  
7 the Legal Advisory is far more than a restatement, without commentary, of CDE’s prior position  
8 regarding who may administer insulin to diabetic children in California’s public schools. The  
9 Legal Advisory is replete with commentary, constitutes a complete reversal of its prior published  
10 interpretation of the law<sup>4</sup> and announces a new law based on that new interpretation. See, infra,  
11 Section II.B (discussing the inconsistencies between current law and the Legal Advisory).

12 Moreover, California Government Code section 11340.9(f) (“Section 11340.9(f)”) does  
13 not apply in this case. Section 11340.9(f) exempts from the requirements of the APA any  
14 regulation that embodies the “only legally tenable” interpretation of the law. It

15 codifies the principle that ‘if certain policies and procedures . . .  
16 are . . . essentially a reiteration of the extensive statutory scheme  
17 which the legislature has established, . . . then there is obviously no  
18 duty . . . to enact regulations to cover such reiterations, since the  
sixth commandment of non-duplication prescribes that a regulation  
does not serve the same purpose as a state . . . statute . . .’

19 Morning Star Co. v. State Bd. of Equalization, 38 Cal. 4th 324, 336 (2006) (quoting  
20 Englemann v. State Bd. of Educ., 2 Cal. App. 4th 47, 62 (1991)). In this case, the Legal  
21 Advisory is not the only legally tenable interpretation of the law and, accordingly, section  
22 11340.9(f) does not apply.

23 In order to evade their mandatory ministerial duty to comply with the requirements of the  
24 APA and convince this Court that the Legal Advisory is the “only legally tenable” interpretation

25 \_\_\_\_\_  
26 <sup>4</sup> See, e.g., Petitioners’ Request for Judicial Notice, Exh. 8 (“Program Advisory on Medication  
27 Administration,” in which CDE expressed that unlicensed school personnel should not be  
28 permitted to administer medication by injections, except for emergency medications as  
permitted by law). See, also, Nancy Spradling Declaration (“Spradling Decl.”), Exh. 1  
 (“Medication Administration Assistance in California”), filed and served herewith.

1 of the law, Respondents employ flawed logic that distorts legal reality. First, they read a conflict  
2 into federal and state laws where no conflict exists.<sup>5</sup> Next, they turn their backs on their former  
3 interpretations of law, which were published in the form of their official Program Advisory and  
4 their publication entitled “Medication Administration Assistance in California,”<sup>6</sup> disregard  
5 California’s Nursing Practice Act (“NPA”) and pronounce new law in the form of the Legal  
6 Advisory, all under the guise of resolving that false conflict.<sup>7</sup> Then, they pretend that their  
7 actions are excused because their new law is the “only legally tenable interpretation” to  
8 “reconcile” state law with federal. Respondents’ manipulations are insufficient to circumvent  
9 the requirements of the APA. What Respondents fail to recognize is that, “to the extent any of  
10 the contents of the statement of policy or procedure depart from, or embellish upon, express  
11 statutory authorization and language, the agency will need to promulgate regulations” in  
12 accordance with the APA. Morning Star Co., 38 Cal. 4th at 336 (quoting Englemann, 2 Cal.  
13 App. 4th at 62). Section 11340.9(f) has no application where, as here, the agency is expounding  
14 a new interpretation of state law, thereby creating an entirely new law. Clearly, that is the case  
15 here. The Legal Advisory does not merely recite or reiterate an existing statutory scheme. The  
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17  
18 <sup>5</sup> See, *infra*, Sections II.B and II.C (describing the consistency between federal and state law).

19 <sup>6</sup> CDE’s publication entitled “Medication Administration Assistance in California” expressly  
20 states, *inter alia*, that (1) “only a licensed nurse or physician may administer medication”; and  
21 “[t]he terms ‘assist’ and ‘administer’ are plainly not synonymous.” See Spradling Decl.,  
22 Exh. 1.

23 <sup>7</sup> Respondents’ claim that they faced a “dilemma” about school districts that were not meeting  
24 the legal requirements of state and federal disability law is misstated. Respondents did not  
25 face a “dilemma” due to any conflict between state and federal law. Respondents’  
26 “dilemma” arose from the fact that the school districts failed and refused to satisfy the legal  
27 requirements of disability law within the requirements of the NPA. The real dilemma was  
28 not whether to make someone available to administer insulin, but who should be available to  
administer insulin. Perhaps Respondents’ fundamental misunderstanding of the dilemma  
contributed to the adoption of the legally improper solution found in the Legal Advisory.  
Respondents and Intervenor miss the point that the federal disability laws on which they rely  
in support of their unlawful Legal Advisory are not prescriptive. They merely create the  
right to a free, appropriate education in the least restrictive environment. They do not tell  
Respondents or local school districts how to ensure that students receive it. Most  
importantly, those federal disability laws do not prohibit states from enacting licensing  
requirements for the protection of the public, nor do they excuse compliance with those  
licensing requirements.

1 truth is quite the contrary – it announces Respondents’ new interpretation of existing law and, de  
2 facto, creates new law.

3 Moreover,

4 The APA establishes that ‘interpretations’ typically constitute  
5 regulations [and, therefore,] it cannot be the case that any  
6 construction, if ultimately deemed meritorious after a close and  
7 searching review of the applicable statutes, falls within the  
8 exception provided for the sole ‘legally tenable’ understanding of  
9 the law. Were this the case, the exception would swallow the rule.  
10 Rather, the exception for the lone ‘legally tenable’ reading of the  
11 law applies only in situations where the law ‘can reasonably be  
12 read only one way,’ such that the agency’s actions or decisions in  
13 applying the law are essentially rote, ministerial, or otherwise  
14 patently compelled by, or repetitive of, the statute’s plain language.

15 Morning Star Co., 38 Cal. 4th at 336-37 (internal citation omitted). Here, the Legal Advisory  
16 clearly does not express the only legally tenable reading of state and federal law, nor is it a “rote”  
17 or “ministerial” application of state and federal law. In fact, Respondents have so much as  
18 recognized this fact in the past.

19 Respondents’ Program Advisory, published in May 2002, states that unlicensed school  
20 staff members should not administer medications that: (1) must be administered by injection;<sup>8</sup>  
21 (2) have potential for immediate severe adverse reactions; or (3) require a nursing assessment or  
22 dosage adjustment<sup>9</sup> before administration. Petitioners’ Request for Judicial Notice, Exh. A.  
23 Likewise, Respondents’ 2006 publication entitled “Medication Administration Assistance in  
24 California” states that unlicensed school personnel may not “administer medication like insulin .  
25 . . to K-12 students in California public schools[.]” That publication also states:

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26 <sup>8</sup> Petitioners are fully aware of the various instruments that can be used to administer insulin.  
27 See Intervenor’s Opp. Brief at 7 n.11. However, regardless of whether a hypodermic syringe  
28 or other instrument is utilized, insulin must be administered by breaking the skin. This case  
does not involve the administration of oral over-the-counter or prescription medications, and  
Intervenor’s attempt to analogize the administration of insulin to handing a student a standard  
dose of cough syrup that the student orally ingests is ludicrous. See id. at 22.

<sup>9</sup> The parties agree that amount of insulin a student requires will vary depending upon a host of  
variables. A physician cannot write an order that covers every imaginable circumstance in  
the inherently unpredictable world of a child. Accordingly, dosage adjustment may be left,  
in whole or in part, to the person administering the medication.

1 California law states, with a few clearly specified legal exceptions,  
2 that only a licensed nurse or physician may administer medication.  
In the school setting, these exceptions are situations where:

3 The student self-administers the medication;

4 A parent or parent designee, such as a relative or close friend,  
5 administers the medication; or

6 There is a public disaster or epidemic.

7 See Spradling Decl., Exh. 1 (citing sections 2725 and 2727 of the NPA and California Education  
8 Code section 49423 (“Section 49423”) and footnote 4, stating that “NPA Section 2727(d) states  
9 that a district not having a school nurse does not qualify as a ‘public disaster’”). This is  
10 irrefutable evidence that the Legal Advisory, which advises the contrary, is not the only legally  
11 tenable interpretation of the law.<sup>10</sup> In other words, Respondents’ own publications set forth a  
12 different, wholly tenable and superior interpretation of the law — the same interpretation that  
13 Respondents have advanced for years: that only licensed personnel can administer insulin in  
14 California’s public schools and, therefore, that the local school districts must make licensed  
15 personnel available to perform that task or provide other reasonable accommodations to ensure  
16 that diabetic students receive a free, appropriate public education in the least restrictive  
17 environment.<sup>11</sup> As discussed below, the unlawful Legal Advisory simply is not the only  
18 reasonable accommodation that would satisfy the Americans with Disabilities Act (“ADA”)  
19 (42 U.S.C. §§ 12101 et seq.), the Rehabilitation Act (29 U.S.C. §§ 701 et seq.), or the Individuals  
20 with Disabilities Education Act (“IDEA”) (20 U.S.C. §§ 1400 et seq.).

21 Finally, Respondents claim that there is no “principled reason” to permit a state agency to  
22 publicize interpretations of state law used in enforcement litigation, but to prohibit it from

23 \_\_\_\_\_  
24 <sup>10</sup> The following laws and regulations were deemed to be “relevant” to the interpretations set  
25 forth in the Program Advisory: California Education Code sections 44871, 44873, 44874,  
26 44875, 44876, 44877, 44878, 49400, 49422(a) and 49423; C.C.R. Title 5, sections 600,  
601(e), (f) and (h), and 604. In their Opposition Brief, Respondents rely upon many of these  
27 same laws and regulations in support of their new “interpretation” announced in the Legal  
28 Advisory.

<sup>11</sup> As discussed below, Respondents have provided other reasonable accommodations, as a  
result of which the Legal Advisory is unnecessary.

1 informing local school districts of the terms of its settlement of the K.C. litigation.<sup>12</sup> This  
2 argument ignores the fact that this Legal Advisory is not a simple announcement of terms upon  
3 which CDE settled litigation. As discussed above, it is a pronouncement of new policy that will  
4 be enforced by Respondents going forward. That Respondents elected to improperly issue that  
5 pronouncement as part of a settlement does not change the fact that the Legal Advisory squarely  
6 qualifies as a regulation that only can be issued in compliance with APA rulemaking. Moreover,  
7 the reasons to prohibit Respondents from adopting regulations without public notice and the  
8 opportunity to comment are not only principled but they have been codified in the APA.

9 For the reasons discussed herein, the Legal Advisory is a regulation subject to the  
10 rulemaking requirements of the APA and no exemption applies. Accordingly, the Legal  
11 Advisory is unlawful, is void ab initio and should be declared invalid.

12 2. Adopting the Legal Advisory is not appropriate.

13 Respondents contend that, even if the Legal Advisory is a regulation that is invalid for  
14 failure to comply with the APA, the Court should adopt and enforce the substance of the Legal  
15 Advisory (i.e., order that insulin may be administered by unlicensed school personnel). The  
16 cases cited by Respondents in support of this clearly erroneous proposition are Tidewater and  
17 Capen v. Shewry, 155 Cal. App. 4th 378 (2007). Neither case supports Respondents' argument.

18 In Tidewater, the plaintiff operating vessels off the coast of California sought  
19 adjudication that it was not required to pay certain overtime compensation to its employees. 14  
20 Cal. 4th at 561-63. The plaintiff challenged a pronouncement by the Labor Commissioner as an  
21 "underground regulation" enacted in violation of the APA. Id. at 563. The Court agreed with  
22 the plaintiff that the Labor Commissioner's pronouncement was a regulation and was invalid. Id.  
23 at 577. Nonetheless, the Court interpreted existing law and determined, without regard to the  
24 invalid regulation, that the plaintiff was required to pay overtime. Id. at 577-78. The Court

25 \_\_\_\_\_  
26 <sup>12</sup> In support, Respondent cites Salizar v. Eastin, 9 Cal. 4th 836, 845 n.4 (1995). The Salizar  
27 case does allow a state agency to provide notice of a judicial decision. However, Salizar  
28 does not support the notion that Respondents, or any state agency, can create regulation,  
announce that regulation as part of a settlement and then enforce it as law. Salizar is of no  
value in resolving the legal issues involved in this litigation.

1 stated that the Labor Commissioner’s “policy may be void, but [validly existing legal rules] are  
2 not void. Courts must enforce those [validly existing rules] just as they would if the [Labor  
3 Commissioner] had never adopted its policy.” Id. at 577 (emphasis in original). Unlike the  
4 instant case, the court in Tidewater applied existing statutory requirements that were mirrored by  
5 the rejected regulation; the court did not impose an erroneous legal standard from the rejected  
6 regulation.

7 Capen is similarly distinguishable. As in Tidewater, the court in Capen disposed of the  
8 plaintiff’s case by applying and interpreting validly existing statutory law. 155 Cal. App. 4th at  
9 389, 394-95. The court did not “adopt” the unlawful regulation as its own and pronounce it as  
10 new law. Id. at 389.

11 There is absolutely no legal support for the proposition that the court may adopt the  
12 substance of an unlawful regulation and pronounce it as new law.<sup>13</sup> Accordingly, this Court may  
13 not do so here.

14 B. California law prohibits unlicensed school personnel from administering insulin.

15 The NPA prohibits unlicensed personnel from administering insulin – the very act  
16 permitted pursuant to the Legal Advisory – except when otherwise authorized by law (Cal.  
17 Bus. & Prof. Code §§ 2700 et seq.). As discussed herein, assisting a student in the  
18 administration of medication is not the same as administering medication and the distinction is  
19 neither insignificant nor unclear, as Respondents urge this Court to believe.

20 1. Administering medication is not the same as assisting with the  
21 administration of medication.

22 Respondents desperately attempt to convince this Court that the words “assist” and  
23 “administer” have the same common meaning and are used interchangeably by the Legislature to  
24 permit unlicensed personnel to introduce medications into the body of others by injection.<sup>14</sup>

25 <sup>13</sup> Even if the Court should determine that the Tidewater rule applies in this case, which  
26 Petitioners deny, the Court should nonetheless reject Respondents’ interpretation of the law  
27 because it is incorrect as a matter of law. Proper statutory interpretation yields a different  
28 result — rejection of the Legal Advisory.

<sup>14</sup> Respondents and Intervenor also argue that the purported nursing shortage supports their  
(cont.)

1 Respondents' argument is without merit and, as explained below, flies in the face of existing  
2 California law that defines the meaning of the word "administer" as the term is used in the  
3 NPA<sup>15</sup> and contradicts Respondents' own publication that the terms "are plainly not  
4 synonymous."<sup>16</sup>

5 The common meaning of the term "administer" is "to give as a remedy." Webster's II New  
6 Coll. Dictionary (2001). The common meaning of the word "assist" is "to aid." *Id.* The words are  
7 not synonymous according to their common definition and understanding.

8 More importantly, the terms "administer" and "assist" are not synonymous under  
9 California law. Although the NPA does not define the word "administer," the California  
10 Attorney General has opined that the definition of the word found in California's pharmacy law  
11 applies to the NPA. 64 Op. Cal. Att'y Gen. 240, 242 n.5 (1981). California's pharmacy law  
12 defines the term to mean "the direct application of a drug or device to the body of a patient or  
13 research subject by injection, inhalation, ingestion, or other means." Cal. Bus. & Prof. Code  
14 § 4016.<sup>17</sup> The Attorney General also has recognized that "Webster's Third New International  
15 Dictionary defines the 'administration' of a medicine as 'application, dosage.'" 71 Op. Cal.  
16 Att'y Gen. 190, 191 (1988). The definition of "administer" found in California Health and  
17 Safety Code section 11002, in the California Uniform Controlled Substances Act, also has been  
18 deemed to apply to the NPA. 64 Op. Cal. Att'y Gen. at 242 n.5. That section provides:  
19 "'Administer' means the direct application of a controlled substance, whether by injection,  
20 inhalation, ingestion, or any other means, to the body of a patient . . . ." Cal. Health & Safety

21 \_\_\_\_\_  
22 interpretation of state law. Even assuming the accuracy of the factual proposition, it lacks  
23 legal merit – a purported shortage of nurses does not support a unilateral change in existing  
24 law.

23 <sup>15</sup> See Respondents' Opp. Brief at 14-15; Intervenor's Opp. Brief at 21-24. Petitioners'  
24 arguments herein, in response to the position erroneously advanced by Respondents in their  
25 brief, also serve as Petitioners' reply to Intervenor's equally erroneous arguments.

25 <sup>16</sup> Spradling Decl., Exh. 1 (Medication Administration Assistance in California).

26 <sup>17</sup> The Attorney General's opinion cited a different section of California pharmacy law, which  
27 has since been repealed. See 64 Op. Cal. Att'y Gen. at 242 n.5 (citing Cal. Bus. & Prof.  
28 Code § 4213). That section defined "administer" to mean "the furnishing  
... to [a physician's] patient of such amount of drugs or medicine . . . as are [sic] necessary  
to [his] immediate needs . . . ." Cal. Bus. & Prof. Code § 4213 (repealed 1996).

1 Code § 11002. Under even the most strained interpretation, the word “assist” cannot reasonably  
2 be interpreted as synonymous with the term “administer” as that word has been defined under  
3 California law.

4 Respondents have recognized that “administer” and “assist” have different meanings and  
5 cannot be used interchangeably. In their 2006 publication “Medication Administration  
6 Assistance in California,” Respondents addressed this very issue. They determined that Section  
7 49423:

8           permits the school nurse or other designated school personnel to  
9 “assist” students who must “take” medication during the school  
10 day that has been prescribed for that student by his or her  
11 physician. The terms “assist” and “administer” are plainly not  
12 synonymous. An example of an unlicensed school employee  
13 “assisting” a student pursuant to EC Section 49423 would be when  
14 the school secretary removes the cap from the medication bottle,  
pours out the prescribed dose into a cup or a spoon, and hands the  
cup or spoon to the student, who then “takes” or self-administers  
the required medication. There is no clear statutory authority in  
California permitting that same unlicensed school employee to  
“administer” insulin . . . .

15 Respondents’ argument to the contrary now is disingenuous. Perhaps that explains why  
16 the only “evidence” offered in support of the argument that these two terms are used  
17 interchangeably and have the same common meaning is Respondents’ new interpretation of the  
18 plain language of Section 49423 and Respondents’ self-serving assumptions and beliefs about  
19 what the Governor meant when he used the terms “administer” and “assisted” when he vetoed  
20 A.B. 481.<sup>18</sup>

21 Respondents’ and Intervenor’s claim that Education Code section 49423 permits  
22 unlicensed school personnel to administer insulin has no merit and is unsupported by the law. In  
23 support of their argument, Respondents and Intervenor simply restate the plain language of the  
24 statute. They offer nothing but their own self-serving and new interpretations to suggest that the  
25 language of the statute is intended to permit unlicensed school personnel to inject insulin into the  
26

27 <sup>18</sup> Of course, Respondents’ assumptions of what the Governor “apparently believed” have no  
28 meaningful evidentiary value of legislative intent.

1 bodies of California's school children. In reality, the plain language of the statute is entirely  
2 consistent with the NPA's general rule that only licensed nurses may administer medications  
3 because "other" (i.e., unlicensed) personnel may only assist students with their medications.  
4 Any other construction of the plain language of this statute reads the words "assisted" and "other  
5 designated school personnel" out of the statute as meaningless.

6 Respondents and Intervenor also assert a "poor legislative drafting defense" which is  
7 similarly unpersuasive. If those words are meant to be synonymous in Section 49423, then:  
8 (1) the plain language of this statute makes no sense; (2) the words "assisted by" in the text of  
9 subsection (a) are superfluous and have no real meaning; and (3) all lawfully created statutory  
10 exceptions in the Education Code to the general rule that only licensed personnel can inject  
11 medication into the body of a California school student are unnecessary. Moreover, even if the  
12 Education Code is poorly drafted and ambiguous, the NPA quite clearly prohibits unlicensed  
13 personnel from administering insulin, which is defined as a nursing function. Bus. & Prof. Code  
14 § 2525(b).

15 It is clear that the words "administer" and "assist" do not have the same meaning, are not  
16 interchangeable and, in fact, were not used interchangeably in the Education Code or any other  
17 relevant statute. Respondents' new interpretation and argument to the contrary must fail.

18 2. Exceptions for administering insulin or other drugs in other settings do not  
19 confer authority upon unlicensed school personnel to administer insulin to  
20 school children.

21 Respondents and Intervenor contort the rules of statutory construction in an effort to  
22 convince this Court that unlicensed school personnel are authorized to administer insulin  
23 because: (a) the NPA contains exceptions that permit unlicensed personnel to administer other  
24 medications in other settings; and (b) other statutes have codified explicit exceptions to permit  
25 diabetic individuals to self-administer insulin and to permit those who have special fiduciary  
26 relationships with diabetic individuals to administer insulin to them. There is not a single shred  
27 of valid evidentiary or authoritative support for this argument. To the contrary, the fact that the  
28 legislature made explicit exceptions to the rule that only licensed personnel can administer

1 insulin actually is evidence of its intent that the general rule (prohibiting unlicensed persons from  
2 administering insulin) should apply in all other circumstances.

3 The canon of construction expressio unius est exclusio alterius holds that to express or  
4 include one thing implies the exclusion of another. Gikas v. Zolin, 6 Cal. 4th 841, 852 (1993).  
5 By explicitly creating statutory exceptions that permit unlicensed personnel to administer insulin  
6 in some settings, the legislature has excluded unlicensed personnel from administering insulin in  
7 other settings. In other words, the fact that the legislature codified an explicit exception to  
8 permit diabetic patients to self-administer insulin and to permit those who have special fiduciary  
9 relationships with diabetic individuals to administer insulin to them (i.e., foster parents) is not  
10 evidence of the legislature's intent to confer authority upon unlicensed school personnel to  
11 administer insulin to California's diabetic school children.<sup>19</sup>

12 The bottom line is this: there is no validly existing statutory exception that permits  
13 unlicensed school personnel to administer insulin to California's diabetic school children.  
14 Legislative attempts to create such an exception have failed. In an unlawful attempt to do what  
15 the legislature did not, Respondents and Intervenor created an exception by issuing the unlawful  
16 Legal Advisory in violation of the APA. Their attempt must fail. In the absence of any statutory  
17 authority to the contrary, unlicensed school personnel may not administer insulin to California's  
18 school children. Accordingly, the Legal Advisory should be declared invalid, Respondents  
19 should be enjoined from enforcing it and Petitioners should be granted relief.

20 C. Preemption does not apply in this case.

21 In another desperate attempt to justify improperly authorizing unlicensed school  
22 personnel to administer insulin to school children, Intervenor<sup>20</sup> incorrectly asserts that federal  
23

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24 <sup>19</sup> To suggest, as Respondents and Intervenor do, that there is no distinction between parents  
25 administering insulin to their children and unlicensed school personnel administering insulin  
26 to school children is a slap in the face to parents (and others with similar fiduciary duties)  
27 who struggle to manage their children's diabetic condition from minute-to-minute, hour-by-  
28 hour and day-to-day, and who have intimate knowledge of how their children appear and feel  
under a wide variety of circumstances.

<sup>20</sup> Respondents make similar arguments. Petitioners' reply to Intervenor's preemption  
arguments also serve as Petitioners' reply to Respondents' preemption arguments.

1 law preempts the NPA “to the extent it would frustrate the purposes of federal disabilities law.”<sup>21</sup>  
2 Intervenor’s preemption argument fails, however, because the NPA does not frustrate any federal  
3 laws. To the contrary, it explicitly identifies several ways to permit diabetic students to  
4 participate in everyday school activities.

5 Intervenor correctly acknowledges that the party contending that state law is preempted  
6 has the burden of establishing preemption. Bronco Wine Co. v. Jolly, 33 Cal. 4th 943, 956  
7 (2004). It also correctly identifies the general federal preemption standards. See Intervenor’s  
8 Brief at 15:1-11. Nonetheless, Intervenor fails to mention several very important rules that must  
9 be considered when conducting every preemption analysis. For example, “[t]here is a strong  
10 presumption against finding that state law is preempted by federal law.” Comm. of Dental  
11 Amalgam Mfrs. & Distribs. v. Stratton, 92 F.3d 807, 811 (9th Cir. 1996). Moreover, regulation  
12 of health and safety matters, which is at issue here, is primarily and historically a matter of local  
13 concern. Chem. Specialties Mfrs. Ass’n, Inc. v. Allenby, 958 F.2d 941, 943 (9th Cir. 1992).  
14 “Consequently, Courts should be especially reluctant to find preemption of state law in these  
15 areas.” Id.<sup>22</sup> Obviously, these tenets are critical to this preemption analysis, yet Intervenor failed  
16 to direct the Court’s attention to them.

17 Likewise, Intervenor fails to appreciate the type of conflict necessary to find preemption.  
18 Conflict preemption occurs when it is impossible to comply with both state and federal  
19 requirements or where state law stands as an obstacle to the accomplishment and execution of  
20 the full purposes and objectives of Congress. Williamson v. Gen. Dynamics Corp., 208 F.3d  
21 1144, 1152 (9th Cir. 2000); see also Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 710 (9th  
22 Cir. 1997) (holding that the state statute at issue “does not remotely purport to require the doing  
23 of any act which would be an unlawful employment practice under Title VII”). The fact that

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24 <sup>21</sup> Intervenor used the federal disability laws as a sword to coerce Respondents into issuing the  
25 Legal Advisory in the underlying case. Now, Respondents attempt to use the federal  
26 disability laws as a shield to protect their unlawful promulgation of the Legal Advisory in  
27 violation of the APA. Unfortunately for Respondents and Intervenor, federal disability laws  
do not make the Legal Advisory “legal.”

28 <sup>22</sup> Issues of preemption may be resolved as a matter of law. Rose v. Chase Manhattan Bank  
USA, 396 F. Supp. 2d 1116, 1119 (C.D. Cal. 2005).

1 there is tension between federal and state law is legally insufficient to establish conflict  
2 preemption. Rather, conflict preemption occurs only in those situations where conflicts “will  
3 necessarily arise.” Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 988 (9th Cir.  
4 2007) (emphasis added). Similarly, “[t]he existence of hypothetical or potential conflict” with  
5 federal law is legally “insufficient to warrant preemption of the state statute.” Sanders v.  
6 Lockyer, 365 F. Supp 2d 1093, 1101 (N.D. Cal. 2005); see also Chamberlan v. Ford Motor Co.,  
7 314 F. Supp 2d 953, 957 (N.D. Cal. 2004) (“[t]here must be ‘clear evidence’ of such a conflict.  
8 Speculative or hypothetical conflict is not sufficient: only State law that ‘actually conflicts’ with  
9 federal law is preempted”) (internal citations omitted). If it is possible to comply with both  
10 federal and state law, there is neither “conflict” nor “frustrated purpose” preemption.  
11 Ginochio v. Surgikos, Inc., 864 F. Supp. 948, 951 (N.D. Cal. 1994) (citing Bravman v. Baxter  
12 Healthcare Corp., 842 F. Supp. 747, 753 (S.D.N.Y. 1994)).

13 “In determining whether state law is preempted by a federal statute based on frustration  
14 of purpose, the court must ‘be guided by the goals and policies’ of the statute at issue.” Kent v.  
15 DaimlerChrysler Corp., 200 F. Supp. 2d 1208, 1213 (N.D. Cal. 2002) (quoting Int’l Paper Co. v.  
16 Ouellette, 479 U.S. 481, 493 (1987)). Federal disability laws protect disabled persons from  
17 discrimination by prohibiting their exclusion from participation in federally funded activities.  
18 Cerepac v. Health & Hosps. Corp., 147 F.3d 165, 167 (2d Cir. 1998) (citing the Rehabilitation  
19 Act and the ADA). However, they only require “reasonable accommodations.” Fink v. New  
20 York City Dep’t of Pers., 53 F.3d 565, 567 (2d Cir. 1995). They do “not require the perfect  
21 elimination of all disadvantage that may flow from the disability” or every accommodation  
22 requested. Id.; see also Carter v. Bennett, 840 F.2d 63, 67 (D.C. Cir. 1988); Sharpe v. Am.  
23 Tel. & Tel. Co., 66 F.3d 1045, 1049-50 (9th Cir. 1995).

24 Here, as recognized by Respondents and Intervenor, state law identifies seven categories  
25 of persons who can administer insulin to children while at school: (1) the student; (2) a school  
26 nurse or physician; (3) a licensed school employee; (4) a contracted registered nurse or licensed  
27 vocational nurse; (5) a parent or guardian; (6) a parent’s/guardian’s designee, who is not an  
28 employee of the LEA; and (7) unlicensed voluntary school employee with appropriate training in

1 an emergency. Petitioner's Request for Judicial Notice, Exh. A, pp. 6-8 (CDE's Program  
2 Advisory on Medication Administration, May 2002). Certainly, these seven reasonable  
3 accommodations adequately meet the purpose of federal disability laws. See, e.g., DeBord v.  
4 Bd. of Educ., 126 F.3d 1102, 1106 (8th Cir. 1997); Davis v. Francis Howell Sch. Dist., 138 F.3d  
5 754, 757 (8th Cir. 1998) (permitting parents or others to come to the school to administer  
6 medication that the school declines to administer constitutes a reasonable accommodation); cf.  
7 Cerepac, 147 F.3d at 168 (finding no ADA or Rehabilitation Act violation where a municipal  
8 agency's closing of specialized health care facility would eliminate or reduce some services  
9 needed by disabled children and would inconveniently relocate other services that those children  
10 required; "disabilities statutes do not guarantee any particular level of medical care for disabled  
11 persons, nor assure maintenance of service previously provided"). The licensing requirements of  
12 the NPA simply are not preventing or otherwise standing in the way of a free, appropriate public  
13 education for diabetic school children. It is the Respondents' failure to provide licensed staff or  
14 contractors that is impeding compliance with federal law.

15 Even so, Intervenor argues that the NPA frustrates federal disability laws because  
16 California is suffering from a nursing shortage.<sup>23</sup> This assertion is insufficient to meet  
17 Intervenor's burden to establish conflict preemption, as the purported shortage, assuming it  
18 exists, does not establish an "irreconcilable" conflict between the federal and state laws.  
19 Sanders, 365 F. Supp. 2d at 1101. Instead, as discussed above, it is quite possible to comply with  
20 both federal and state law, as set forth in CDE's Program Advisory on Medication  
21 Administration. Petitioner's Request for Judicial Notice, Exh. A, pp. 6-8. In fact, at least four  
22 other categories of individuals may administer insulin under various scenarios. Id.

23 \_\_\_\_\_  
24 <sup>23</sup> Contrary to Intervenor's suggestion, Petitioners never have taken the position that the need  
25 for more nurses is a reason to permit unlicensed individuals to perform nursing functions,  
26 and even that suggestion is an affront to all that Petitioners stand for. Furthermore, there is  
27 no evidence to support any causal connection between a nursing shortage, assuming that one  
28 exists, and failure to provide reasonable accommodation to diabetic school children. The  
failure and refusal to hire nurses is the real problem here. Respondents and the local school  
districts make nurses "unavailable" by failing and refusing to hire or contract with them.  
Even so, reasonable accommodations consistent with the NPA are available under existing  
law.

1           Importantly, federal law does not prohibit limiting the administration of insulin to the  
2 seven categories discussed above. The court's decision in Bronco Wine Co. v. Jolly is  
3 instructive here. 33 Cal. 4th 943, 989-93 (2004). In Bronco Wine, the court ruled that a state  
4 statute prohibiting what the federal law "does not prohibit" does not "stand as an obstacle to the  
5 accomplishment and execution of the full purposes and objectives of Congress." Id. at 992-93.  
6 "[T]here is a difference between (1) not making an activity unlawful, and (2) making that activity  
7 lawful." Id. at 992 (quoting Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.  
8 4th 163, 183 (1999)). The statute at issue in Bronco Wine required that "when the word 'Napa'  
9 (or any federally recognized viticultural region within Napa County) appears on a brand label, at  
10 least 75 percent of the grapes used to make that wine must be from Napa County." Id. at 950.  
11 The court held that the state statute was not preempted by federal law, as the state statute was  
12 consistent with the overall purpose of the federal statutes, i.e., exempting "from the federal  
13 regulation's prohibition an otherwise misleading geographic brand name if the brand name was  
14 in use prior to July 7, 1986, and the front label also discloses the true geographic source of the  
15 grapes used to make the wine contained in the bottle." Id. at 950, 953-54, 993 (emphasis  
16 removed). Similarly here, neither the ADA, the Rehabilitation Act nor IDEA prohibits the  
17 NPA's requirements relating to the administration of insulin.<sup>24</sup>

18           Finally, the cases cited by Intervenor are distinguishable and/or inapplicable.<sup>25</sup> In Rim of  
19 the World Unified School District v. Superior Court, 104 Cal. App. 4th 1393, 1398-99 (2002),  
20 the court was presented with a direct conflict. Federal law prohibited educational institutions  
21

22 <sup>24</sup> The decision in Sanders also is helpful. 365 F. Supp. 2d at 1101. There, the court found that  
23 certain state statutes (which were the result of a settlement agreement between the state and  
24 several tobacco manufacturers) were not preempted by the Sherman Act, despite plaintiff's  
25 argument that the settlement agreement created an incentive for the manufacturers to violate  
26 the Sherman Act. Id. "This scenario presents a 'hypothetical' or 'potential' conflict with the  
27 Sherman Act, but not the 'irreconcilable' conflict required for preemption. The California  
28 statutes do not mandate, permit, or place irresistible pressure on manufacturers to take  
concerted action; rather they require unilateral action by each to make settlement or escrow  
payments." Id. Similarly here, the NPA does not "mandate, permit or place irresistible  
pressure" on schools to fail to accommodate diabetic children.

<sup>25</sup> See also People v. Edward D. Jones & Co., 154 Cal. App. 4th 627 (2007) (no preemption  
found); Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994) (not a preemption case).

1 from receiving federal funds if they released student records. Id. at 1398. State law mandated  
2 the release of certain student records. Id. at 1396-97. Therefore, it was impossible to comply  
3 with both laws. Id. at 1400. Here, as discussed above, it is not impossible to comply with both  
4 federal and state laws as the laws are not inconsistent. The NPA specifically identifies seven  
5 categories of individuals who may administer insulin to school children. This undoubtedly  
6 constitutes a reasonable accommodation under federal law. In Gade v. National Solid Wastes  
7 Management Association, 505 U.S. 88, 98-99 (1992), the court found that the federal  
8 Occupational Health and Safety Act preempts state regulation of occupational safety and health  
9 issues where a federal standard is in effect without express approval because the plain language  
10 of the federal law requires a state to submit a plan if it wishes to “assume responsibility” for such  
11 regulation. Again, this is distinguishable from the present situation as federal laws do not require  
12 the state to seek approval of its public health and licensure regulations. In fact, as mentioned  
13 above, such issues are primarily and historically a matter of local concern. Chem. Specialties,  
14 958 F.2d at 943. Finally, in Crowder v. Kitagawa, 81 F.3d 1480, 1485-86 (9th Cir. 1996), the  
15 summary judgment in favor of the state (based on a 120-day quarantine of service animals) was  
16 reversed because the regulation “effectively precludes visually-impaired persons from using a  
17 variety of public services, such as public transportation, public parks, government buildings and  
18 facilities, and tourist attractions, where humans or animals are inevitably present.” Not only is  
19 the procedural posture dissimilar, the regulation in Crowder precluded, without any reasonable  
20 accommodation, certain disabled persons from numerous public services. To the contrary here,  
21 reasonable accommodations have been made and Respondents have several direct options exist  
22 to enable diabetic school children to take full advantage of their free, appropriate public  
23 education in the least restrictive environment.

24 For the reasons stated herein, Intervenor and Respondents failed to establish that the NPA  
25 is preempted by federal disabilities law.

26 **III. CONCLUSION.**

27 For the reasons set forth herein, the Court should (a) issue a writ of mandate under  
28 California Code of Civil Procedure section 1085 (or, in the alternative, section 1094.5) (i) setting

1 aside, vacating and invalidating the "Legal Advisory"; (ii) enjoining Respondents from taking  
2 any action in connection with the Legal Advisory; (iii) compelling Respondents to act in  
3 compliance with all applicable laws and regulations respecting any future decisions and/or  
4 findings concerning the acceptable methods for administering insulin to California students;  
5 (b) enjoin Respondents from taking any further action to implement or enforce the Legal  
6 Advisory; and (c) declare that Respondents' issuance of the Legal Advisory was in excess of  
7 their jurisdiction, an abuse of discretion, arbitrary and capricious and in violation of applicable  
8 state law, including without limitation, the APA, the NPA and the California Constitution.

9  
10 Dated: October 22, 2008

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