In the Supreme Court of the State of California

AMERICAN NURSES ASSOCIATION et al., Plaintiffs and Respondents, vs. JACK O'CONNELL, as Superintendant of Public Education, etc., et al., Defendants and Appellants. AMERICAN DIABETES ASSOCIATION, Intervenor and Appellant.	)	No. S184583

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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STATEMENT OF ISSUES

This case presents questions of law involving the scope of nursing practice in the State of California and the extent of the California Department of Education's rulemaking authority. The questions presented address who will provide health services to students in California K-12 public schools, particularly those health services such as medication administration that are within the scope of practice of licensed health care professionals.

Appellant misstates the issues in its Opening Brief on the Merits ("AppOpBr").[1] The real issues are:

1. Whether the Court of Appeal correctly determined that unlicensed school personnel lack authority to administer insulin to students who require it under a Section 504 Plan or IEP; and

2. Whether, in the event of reversal, the case should be remanded to the Court Of Appeal to decide if the California Department Of Education's "Legal Advisory" purportedly authorizing unlicensed school personnel to administer insulin violates the Administrative Procedure Act ("APA").

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[1] For example, Appellant asks this Court to consider the issue of whether "the NPA prohibits unlicensed persons from administering medication to anyone...?" That has never been an issue in this case.

INTRODUCTION

In this case, the Court is called upon to uphold the expression of legislative intent, codified in the Nursing Practice Act ("NPA") and Education Code ("EC"), that students are entitled to receive health care services from those who are best able to provide them—licensed health care professionals.

The Court of Appeal properly determined that the plain language of the NPA is evidence of the California Legislature's intent that medication should be administered only by licensed health care professionals, absent a statutory exception, and that no such exception applies to permit unlicensed school employees to administer insulin to students. The Court also correctly concluded that the Education Code does not authorize unlicensed school employees to administer medication to students, even if they have a 504 Plan or an IEP.

This case also calls upon the Court to protect the public's important interest in "bureaucratic responsiveness and public engagement in agency rulemaking." *Morningstar Co. v. State Bd. of Equalization*, 38 Cal.4th 324, 333 (2006). Although the Court of Appeal did not reach the issue, the trial court properly determined that the Legal Advisory, created pursuant to a settlement agreement between private citizens and California Department of Education, among others, which attempted to authorize unlicensed

school personnel to administer insulin, was published in violation of the APA.

The answers to the critical questions posed by this case depend on the proper interpretation of the NPA, Education Code and APA. Respondents herein will demonstrate that Appellant's proposed interpretations are flawed and should be rejected. The decision of the Court of Appeal should be affirmed.

STATEMENT OF THE FACTS

A. The Legal Advisory

Following several failed attempts to pass legislation requiring schools to make available and train unlicensed school personnel to administer insulin[2] to students with diabetes, Appellant and others filed a class action lawsuit against the California Department of Education, Superintendent of Public Instruction Jack O'Connell (together, "CDE") and others, claiming that California public schools violated the Americans with Disabilities Act, Section 504 of the Rehabilitation Act (Section 504) and the Individuals with Disabilities Education Act ("IDEA") for allegedly failing to ensure that students with diabetes received insulin when they needed it at school. MajOpn/3; Appellant's Appendix ("AA"), vol. 2, at

[2] These failed attempts to pass legislation were summarized by the Court of Appeal in its majority opinion ("MajOp") at 28-32.

401-402. Ultimately, the case was settled (1AA171-227) and, pursuant to the settlement agreement, CDE issued a "Legal Advisory on the Rights of Students with Diabetes in California's K-12 Schools" ("Legal Advisory"). 1AA202-214.

The Legal Advisory violates established law and contravenes the longstanding public policy of CDE, reflected in its own statutory interpretations and regulations, that unlicensed school personnel do not have legal authority to administer insulin to students. MajOpn/24-28; 2AA483; 7AA1709.

The Legal Advisory summarized the seven classes of individuals who may legally administer insulin in California's schools: (1) the student, with authorization from a licensed health care provider and parent or guardian; (2) a school nurse or school physician; (3) a "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) a contracted registered nurse or licensed vocational nurse; (5) a parent/guardian who so elects; (6) a parent/guardian designee, "who shall be a volunteer who is not an employee of the LEA"; and (7) an unlicensed voluntary school employee with appropriate training but "only in emergencies as defined by §2727(d) of the NPA (epidemic or public disasters)." MajOpn 4; 2AA488.

The Legal Advisory went further, however, by reversing CDE's longstanding prohibition against unlicensed school staff administering medications. 2AA489. It created a new, non-statutory eighth category of people allegedly authorized to administer insulin to students – unlicensed school employees. 5AA1109. The Legal Advisory provides that, when no school nurse or other licensed person is available to administer insulin to a student with diabetes, federal law authorizes an unlicensed school employees to do so. AppOpBr/11; 1AA18; 5AA1109; *see* MajOpn/4.

There is no dispute that the Legal Advisory was published and implemented by CDE without complying with the requirements of the APA.[3] The trial court invalidated the Legal Advisory as an illegal regulation under the APA. 8AA2021.

B. Diabetes and Insulin

Insulin is a medication that can be introduced into the human body only by injection or penetration of human tissue. 1AA259. It is so dangerous and requires such substantial scientific knowledge to safely administer that it has been placed on the Institute for Safe Medicine Practices list of high alert medications. 1AA259; 2AA268. High alert medications are drugs that bear a heightened risk of causing significant

[3] CDE, a party to the proceedings below, did raise various excuses for its failure to comply with the APA, which the trial court found to be unpersuasive.

patient harm when they are used in error. 1AA259; 1AA268; 2AA273. The consequences of an error when administering high alert medications "are clearly more devastating to patients" and require "special safeguards to reduce the risk of errors." 1AA268. For these reasons, it is standard practice in hospitals to require registered nurses to follow special procedures before high alert medications, including insulin, are administered. 1AA259; 1AA268; 2AA273.

Managing diabetes requires careful and continual balancing of insulin intake, food, physical condition and physical activity to keep blood glucose levels within the normal range. AppOpBr/5. Blood glucose levels must be regularly monitored, which is accomplished by pricking the skin with a lancet. *Id.* Treatment responses must be monitored because:

> high blood glucose levels, or hyperglycemia, can result from too little insulin, too much food or decreased exercise, and can impair cognitive abilities and cause increased thirst, frequent urinary, nausea, blurry vision and fatigue. (3AA717; 6AA1428). Untreated hyperglycemia can cause a life threatening condition caused diabetic ketoacidosis, characterized by labored breathing, weakness, confusion, and sometimes unconsciousness. (3AA/717-18; 6AA/1429). Over time, hyperglycemia leads to serious complications, including heart disease, blindness, kidney failure, and amputation. (6AA/1428)...if not treated promptly, hypoglycemia can cause unconsciousness, seizures and convulsions, and is life threatening. (3AA/717; 6AA/1426).

AppOpBr/4-5. Administering insulin is complicated. 1AA259; 2AA273. It involves more than filling syringe or pushing a button or plunger.

1AA259; 2AA273. It requires an assessment of the patient, including the patient's history and physical condition.[4] The physical evaluation may include and is not limited to: blood glucose monitoring; an evaluative determination of whether the insulin dose needs to be adjusted for exercise and activity or to match carbohydrate intake; the selection of the correct syringe or familiarity with the appropriate device; selection of the correct form of insulin to avoid a mistake; proper preparation to assure sterility in the procedure; adherence to contamination and infection avoidance techniques; proper procedures to avoid tissue damage; and post administration assessment for adverse reactions. 1AA259; 2AA273-74.

C. Scope of Problem

Only those students who cannot self-administer insulin require someone to administer it to them. Despite Appellant's allegation that "thousands of students" will have to "take their chances with a disease that, when not properly managed, is life-threatening" (AppOpBr/3), the record in this case is conspicuously silent about: (1) how many students in California

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[4] Although Appellant claims that a person administering insulin does not do an assessment (AppOpBr/10), Appellant admits that an assessment, including "regular monitoring of blood glucose levels" is necessary. *Id.* The evidence submitted by Appellant also reveals other assessments that are required, such as "evaluation for signs and symptoms of hyperglycemia and hypoglycemia" (3AA635), and constant monitoring of food intake, activity level and insulin levels and determining whether dosage adjustment is necessary. (5AA1151).

are unable to self-administer insulin; (2) the school districts in which they reside; (3) the schools they attend; (4) whether a nurse or other licensed person is available to them; or (5) the number of students to whom another person authorized by existing law is available to administer insulin.[5]

PROCEDURAL HISTORY

Soon after the Legal Advisory was published, the American Nurses Association and the American Nurses Association\California filed this action against CDE to prohibit enforcement of the Legal Advisory as an unlawful regulation under the APA, Government Code §§ 11346-11351. 1AA1. The complaint also alleged that CDE exceeded the scope of its rulemaking authority by adopting regulations that are inconsistent with the laws of this state, in violation of Government Code § 1152 and Education

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[5] Respondents call attention to this lack of evidence not because Respondents believe that this case is only important if it affects a large number of students, as Appellant implies. AppOpBr/54-55. Rather, it is relevant to Appellant's preemption argument and determining whether the accommodation Appellant demands is necessary and reasonable. Only students who have a section 504 Plan or an IEP and cannot self-administer insulin that they need during the regular school day require reasonable accommodations to secure their right to a free, appropriate, public education free from discrimination as a result of their disability. "Appellants have not provided any specific facts showing what number of schools have a diabetic student with a section 504 Plan or an IEP that requires insulin administration during the school day or at school-related activities who are unable to self-administer their medication and who do not have a parent or guardian who elects to administer their insulin or designate another family member or friend to administer the child's insulin." MajOpn/36. Therefore, as discussed further, *infra*, Appellant's preemption argument fails.

Code § 33031. MajOpn/5; 1AA7-8. Specifically, the Complaint alleged that section 8 of the Legal Advisory is inconsistent with the NPA and Education Code. MajOpn/5; 1AA7.

The trial court granted Appellant leave to intervene. MajOpn/5; 1AA36-38. "Subsequently, First and Second Amended Petitions for Writ of Mandate and Complaints for Declaratory and Injunctive Relief were filed adding the California School Nurses Organization and the California Nurses Association as Plaintiffs/Petitioners." MajOpn/5. (Hereafter, all Plaintiffs/Petitioners are referred to as Respondents).

The matter was briefed and, after argument, the trial court entered judgment in favor of Respondents and against Appellants on all legal issues and issued a Writ of Mandate, directing CDE to refrain from implementing or enforcing those portions of the Legal Advisory that authorized unlicensed school personnel to administer insulin and to remove those portions from the Legal Advisory. MajOpn/6; 8AA2021; 8AA2022-23. Although the trial court considered Appellant's policy position, it concluded that only licensed health care professionals or unlicensed persons expressly authorized by statute are permitted to administer insulin to students. MajOpn/5-6; 8AA2019. In so doing, the trial court rejected Appellant's arguments that the Education Code and its implementing regulations authorize unlicensed school personnel to administer insulin when they are not otherwise permitted to do so by statute. MajOpn/6;

8AA2020. The trial court also concluded that federal disability laws do not preempt California law, which "do[es] not conflict with or impede implementation of the federal requirements for the administration of insulin by qualified personnel." MajOpn/6; 8AA2020. "Rather, the statutes identify licensed health care professionals and certain unlicensed persons who are qualified to administer insulin, ruling out any basis for federal preemption." MajOpn/6; 8AA2020.

CDE and ADA appealed. Again, the issues were extensively briefed and argued. The Court of Appeal found in favor of Respondents on all legal issues and affirmed the judgment of the trial court. MajOpn/2.

Specifically, the Court of Appeal determined:

1. The NPA "affirmatively restricts unlicensed persons from performing the functions of a licensed nurse." MajOpn/9 (rejecting Appellant's argument that the NPA "provides that only a registered nurse may engage in the practice of registered nursing *as a professional registered nurse*." *Id.*).

2. "The injection of insulin into diabetic students…fall[s] within the "administration of medications"—a practice of nursing." MajOpn/12.

3. "[T]he Legislature's authorization of student self-administration of insulin (Ed. Code, § 49414.5, subd. (c)), the administration of insulin to foster children (Health and Saf. Code, § 1507.25, subd. (b)), and the administration of injection by licensed

vocational nurses (Bus. & Prof. Code, § 2860.5, subd. (a)" are manifestations of "the Legislature's decision to except these situations from the prohibition of the practice of nursing generally found in section 2725 [of the NPA]." MajOpn/16.

4. "The exception of section 2727 subdivision (e) [of the NPA], does not permit unlicensed school personnel to administer medications, including insulin, even though the student may have a prescription for those medications from his or her doctor." MajOpn/20.

5. The word "assist" in Education Code section 49423 means to help "in whatever way is legally permitted by the specific individual who is doing the assisting." MajOpn/22.

6. The word "assist" in Education Code section 49423 recognizes that licensed health care professionals may legally administer medications to students but only authorizes unlicensed school employees to help students in ways that "would not normally include the administration of medications." MajOpn/24.

7. "[W]hen viewed as a whole, the legislature's affirmative enactments do suggest that the legislature has seen fit to authorize the administration of only a limited number of medications in limited situations to students by unlicensed school personnel." MajOpn/32.

8. "[Education Code] section 49423 does not authorize unlicensed school personnel to administer the insulin injections that

diabetic students may require pursuant to a section 504 plan or IEP." MajOpn/32.

9. "California's legislative choice to protect the health and safety of the state's children who suffer from diabetes by limiting the administration of insulin injections at school to licensed individuals or expressly authorized individuals is an exercise of the state's traditional police power that triggers the presumption against preemption." MajOpn/34.

10. "California law does not frustrate or stand as an obstacle to the purposes of the federal law in assuring students with disabilities free appropriate public education because schools can comply with both the federal law and the California law." MajOpn/38.

11. "[S]ection 8 of the CDE's Legal Advisory...is invalid." MajOpn/39.

Appellant filed a petition for rehearing, which was denied. Thereafter, Appellant filed its Petition for Review,[6] which was granted.

STANDARD OF REVIEW

The proper interpretation of a statute is a question of law subject to de novo review on appeal. *Kavanaugh v. West Sonoma County Union High School District*, 29 Cal.4th 911, 916 (2003).

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[6] CDE did not file a petition for review.

An appellate court defers to a trial court's factual determinations if supported by substantial evidence. *Id.* However, in this case, Appellant has conceded that any "evidentiary conflict is irrelevant." MajOpn/14.

ARGUMENT

The Court of Appeal properly interpreted the NPA to prohibit individuals who are not licensed health care professionals from administering medication, a nursing function within the plain language of section 2725(b)(2) of the NPA. Accordingly, the Court of Appeal concluded, unlicensed school personnel may not administer medication to students without violating the Nursing Practice Act, unless they are otherwise authorized to do so by statute. Appellant's assertion that the medical orders exception to the NPA should apply to authorize unlicensed school personnel to administer insulin is flawed and the Court of Appeal properly rejected it.[7]

Likewise, neither the Education Code nor any other California statute authorizes unlicensed school employees to administer insulin. Appellant's proposed contrary interpretations of the law are incorrect and were also properly rejected by the Court of Appeal. However, as the Court of Appeal correctly concluded, the prohibition against the administration of

[7] Appellant has abandoned its arguments that other exceptions to the NPA apply.

insulin to students by unlicensed school employees does not conflict with or frustrate the purpose of federal disability laws, because it is possible to comply with *both* state law and federal law. Indeed, California law provides suitable means to accommodate students with diabetes who need insulin at school, thereby avoiding preemption.

In reaching its correct determination, the Court of Appeal properly applied well-established principles of statutory interpretation. In so doing, the Court of Appeal determined that each of Appellant's proposed statutory interpretations is wrong and rejected them all. This Court should do the same.

A. The Court of Appeal correctly determined that unlicensed school personnel lack authority to administer insulin to students who require it under a section 504 Plan or IEP.

1. The Court of Appeal properly interpreted the NPA to prohibit unlicensed school personnel from administering insulin.

To interpret the NPA, the Court must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." *California Teachers Ass'n. v. Governing Bd. of Rialto Unified School Dist.,* 14 Cal.4th 627, 632 (1997) (mandamus action involving interpretation of the Education Code). "In undertaking this determination, we are mindful of this Court's limited role in the process of interpreting enactments from the political branches of

our state government. In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, 'whatever may be the thought of the wisdom, expediency or policy of the act.'" *Id.*

" '[A]s this Court has often recognized, the judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of the government... .'" *Id.* at 633, citing *Kopp v. Fair Pol. Practices Com.*, 11 Cal.4th 607, 675 (1995) (Conc. Op. of Werdegar, J.) "It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the express intention of the legislature. 'This Court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.'" *Id.* (internal citations omitted).

The first step to determine legislative intent "is to scrutinize the actual words of the statute, giving them a plain and common sense meaning." *Id.* "If the language is clear [the court's] search for meaning is at an end; if it is ambiguous, [the court] may then turn to other tools to divine the Legislature's intent." *Lexin v. The Superior Court of San Diego County*, 47 Cal.4th 1050, 1079 (2010). A statute should be interpreted "with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." *Kavanaugh*, 29 Cal.4th at 919.

Applying these rules to the NPA, its plain meaning does not support the interpretations advanced by Appellant.

Although Appellant concedes that "the NPA prohibits the *unauthorized* practice of nursing" (AppOpBr/17), Appellant argues that the NPA does not prohibit unlicensed school employees from administering insulin to students because: (1) school employees are not "professionally engaged" in "rendering services" to the general public as a "means of livelihood" *(id.)*; (2) administering insulin is not a nursing function (AppOpBr/19-22); or (3) administering insulin falls within an exception to the NPA. Appellant is wrong and this Court should decline to adopt Appellant's flawed interpretations.

a. The NPA prohibits unlicensed school employees from performing nursing functions.

The Court of Appeal appropriately rejected Appellant's argument that the NPA does not prohibit school employees from administering insulin to students because they are not rendering professional services to the general public as a means of livelihood. The plain language of the NPA makes clear that no person who does not have a license may perform nursing services. This includes unlicensed school employees. The scope of the NPA's prohibition against the unlicensed practice of nursing is not limited to those who perform nursing functions for remuneration, as Appellant suggests.

The NPA expressly states that "*no person* shall engage in the practice of nursing, as defined in section 2725, without holding a license which is in active status under this chapter, except as otherwise provided in this act." Bus. & Prof. Code ("BP") § 2732 (emphasis added). The words "no person" mean exactly what they say – no individual, including unlicensed school employees, may practice nursing without a license. Indeed, it is a misdemeanor under the NPA to practice nursing (i.e., engage in a nursing function) without an active license or to use any title, sign, card or device to indicate a qualification to practice nursing, impersonate a professional nurse or pretend to be licensed to practice nursing. BP §§ 2796, 2799.

The question, then, is what does it mean to engage in the practice of nursing? The NPA defines the practice of nursing as:

> Those functions, including basic health care…which require a substantial amount of scientific knowledge or technical skill, *and includes…*
>
> * * *
>
> (b) direct and indirect patient care services, *including*, but not limited to, *the administration of medication….*

BP § 2725(b) (emphasis added). The plain language of the statute is crystal clear. A person who administers medication is engaged in the practice of nursing. Nothing in the statute limits the prohibition against unlicensed nursing practice to those who are professional nurses paid for their services, as Appellant contends. "Thus, contrary to the argument of Appellant that

the NPA 'provides that only a registered nurse may engage in the practice of registered nursing as a professional registered nurse,' the NPA...also affirmatively restricts unlicensed persons from performing the functions of a licensed nurse." MajOpn/9.[8]

This conclusion is supported by the legislative history of the NPA. Earlier versions of the NPA contained a provision limiting its application to those who received compensation for performing nursing functions. However, that provision was stricken in 1974. History of BP § 2725; stats.

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[8] Appellant's claim that the NPA permits nurses to delegate nursing functions to others does not compel a contrary conclusion. The NPA never uses the word "delegate." Moreover, the Board of Registered Nursing document, "An Explanation of the Scope of RN Practice," upon which Appellant relies, does not say that RNs may delegate medication administration to people who do not have a health care license, generally, or to unlicensed school personnel, specifically. Rather, it states that the scope of nursing practice includes "indirect patient care services that insure the safety, comfort, personal hygiene and protection of patients, and the performance of disease prevention and restorative measures. Indirect services include delegation and supervision of patient care activities performed by subordinates." BRN, "An Explanation of the Scope of RN Practice", *available at* http://www.rn.ca.gov/pdfs/regulations/-npr-b-03.pdf (as of January 3, 2011). "Subordinates" typically include health care providers who work with or under the RN. In fact, the BRN interprets the NPA to prohibit nurses from delegating administration of medication, including insulin, to unlicensed individuals. "Tasks which require a substantial amount of scientific knowledge and technical skill may not be assigned to unlicensed assistive personnel." BRN, "Unlicensed Assistive Personnel" (November 1994), *available at* http://www.rn.ca.gov/pdfs/regulations/npr-b-16.pdf (as of January 18, 2011). As noted *infra*, the NPA expressly defines administration of medication as a nursing function that requires substantial knowledge or technical skill. NPA § 2725(b). Accordingly, it cannot be delegated to unlicensed school employees.

1974 ch. 355 section 1, ch. 913 section 1. The plain language of the NPA clearly prohibits the unlicensed practice of nursing by any person, including unlicensed school employees.

b. Administering insulin is a nursing function.

Having demonstrated that the NPA prohibits unlicensed persons from performing functions of a licensed nurse—regardless of whether they are providing services to the "general public" as a "means of livelihood"—the question is whether administering insulin is a nursing function. The Court of Appeal properly determined that it is. MajOpn/12.

The plain language of Section 2725(b)(2) of the NPA lists "the administration of medications" as a nursing function. Because the term "administration" is not defined in the NPA, the Court of Appeal properly adopted the definition of "administer" used by the Legislature in two other health care related statues: the pharmacy law (BP § 4000 et. seq.) and the California Uniform Controlled Substances Act (Health & Saf. Code § 1100 et. seq.). Those statutes define "administer" as "the direct application of a drug [(pharmacy law)] or controlled substance [(California Uniform Controlled Substances Act)]...by injection, inhalation, ingestion, or any other means" to the body of a patient. BP § 4016; Health & Saf. Code §11002.

Appellant does not dispute that insulin is a medication or that it must be introduced into the body by injection (with a hypodermic needle, insulin

pump or other device). AppOpBr/5-6. Nonetheless, it contends that the Court of Appeal erred by adding the words "*any* medication *by any method of injection*" into NPA § 2725(b)(2), so that it defines the practice of nursing as those functions, including basic health care…which require a substantial amount of scientific knowledge or technical skill, and includes…(b) direct and indirect patient care services, including, but not limited to, the administration of *any* medication *by any method of injection.* The Court of Appeal did no such thing. It simply refused to impose artificial limits on the scope of nursing practice that do not exist in the plain language of the statute. Notwithstanding Appellant's erroneous argument, injecting insulin into the bodies of students clearly is the "administration of medication," a nursing function.

Appellant further argues that that the nursing functions in section 2725(b)(1)-(4) of the NPA "*may potentially* come within the practice of nursing" (AppOpBr/18), but only if a determination is made that those functions "require a substantial amount of scientific knowledge or technical skill." *Id.* Appellant misconstrues section 2725(b) by turning it upside down to reach the wrong conclusion. The nursing functions that are listed in section 2725(b) are *included* as those that require a substantial amount of scientific knowledge or technical skill. The plain meaning of the statutory language leaves no room for a contrary interpretation.

Section 2725(b) of the NPA is an overt expression of the legislative determination that administration of medication—regardless of the type of medication—requires a substantial amount of scientific knowledge or technical skill and is a nursing function. Adopting Appellant's contrary argument would require the Court to ignore the ordinary meaning of the word "including" in section 2725(b) and eliminate subsection 2, which expressly defines administration of medication as a nursing function. The Court of Appeal rejected Appellant's incorrect interpretation of section 2725(b) , noting that "an interpretation that renders any portion of a statute superfluous, unnecessary, or a nullity" should be avoided because it is presumed "that the legislature does not engage in idle acts." *California Teachers Ass'n.*, 14 Cal.4th at 634. The Court of Appeal was correct and this Court should affirm.

c. The VNPA does not authorize unlicensed school employees to administer insulin.

Appellant's argument that the Vocational Nurse Practice Act (VNPA) supports its incorrect interpretation of the NPA has no merit. AppOpBr/20. The VNPA does not establish that administering medications is not a nursing function; nor does it authorize unlicensed school employees to administer insulin. Rather, the VNPA supports Respondents' position and the Legislature's determination that the administration of insulin requires technical skill. Specifically, BP § 2859 defines the practice of

vocational nursing as "the performance of services requiring those *technical*, manual *skills* acquired by means of a course in an accredited school of vocational nursing, or its equivalent, practiced under the direction of a licensed physician, or registered professional nurse, as defined in the [NPA]." BP § 2859 (emphasis added).

Section 2860.5 of the VNPA permits a licensed vocational nurse (LVN) to administer medications by hypodermic injection only "when directed by a physician and surgeon." BP §2860.5(a). Even then, the LVN may do so only under the direct supervision of the physician or a registered nurse. The VPNA's direct supervision requirement ensures that the medication is administered under the watchful eye of an appropriately licensed individual whose scope of practice authorizes post-administration assessment and initiating changes in the treatment regimen and the initiation of emergency procedures. BP § 2725(b)(4) (NPA provision authorizing nurses to implement changes in the treatment regimen); BP § 2051 (Medical Practice Act provision giving broad authority to medical doctors "to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases… ."). The scope of practice of LVNs does not permit them to perform such duties, which are critical to safe administration of medication, especially high alert medications like insulin. The VNPA does not support Appellant's argument that administering medication is not a nursing function.

The only reasonable interpretation of the scope of the NPA is that it defines the scope of nursing practice to include administration of medication and excludes all others from engaging in nursing functions, including administering medications, except as otherwise authorized by law. The Court of Appeal's interpretation was correct and its decision should be affirmed.

d. The "medical orders" exception to the NPA does not permit unlicensed school employees to administer insulin to students.

No exception to the NPA's prohibition against unlicensed persons administering medication allows unlicensed school personnel to administer insulin to students. The analysis of a statutory exception begins with its language. If the plain meaning is clear, the inquiry ends. *Lexin*, 47 Cal.4th at 1079. " 'It is well settled, also, that a general provision is controlled by one that is special, the latter being treated as an exception to the former.' " *People v. Honig*, 48 Cal.App.4th 289, 328 (1996), *accord People v. Superior Court*, 28 Cal.4th 798, 808 (2002).

Appellant challenges the Court of Appeal's conclusion that the "medical orders" exception to the NPA (BP §2727(e)) applies to permit unlicensed school employees to administer insulin according to a physician's prescription. AppOpBr/28-29. Appellant contends that the Court of Appeal erred by construing BP § 2727(e) too narrowly. Again,

Appellant is wrong. The Court of Appeal properly interpreted the exception's scope.

BP § 2727(e) provides that the NPA does not prohibit "[t]he performance by any person of such duties as required in the physical care of a patient and/or carrying out medical orders prescribed by a licensed physician; *provided, such person shall not in any way assume to practice as a professional, registered, graduate or trained nurse.*" BP §2727(e) (emphasis added). The exception does not permit unlicensed school employees to administer insulin because anyone who administers medication is, by definition (BP § 2725(b)), engaged in the practice of nursing.

The only case involving the "medical orders" exception to the NPA confirms that it does not apply here. In *Kolnick v. Bd. Of Med. Qual. Assur.*, 101 Cal. App. 3d 80 (1980), Dr. Kolnick lost his license for engaging in unprofessional conduct by aiding and abetting a person to practice without a license by instructing unlicensed persons to administer medications by injection into his patients. *Id.* at 83. He defended by arguing that he could not be guilty of aiding and abetting unlicensed practice because the "medical orders" exception to the NPA authorized unlicensed individuals to carry out his orders to give injections. *Id.* at 84. Dr. Kolnick's argument was rejected and the decision to revoke his license was affirmed. *Id.* If the medical orders exception permits unlicensed

individuals to administer medications, then surely Dr. Kolnick would not have been deemed unprofessional for asking his unlicensed office staff to give injections per his orders.

Appellant makes the same argument here, claiming that unlicensed school employees may administer insulin because they are following medical orders and, therefore, do not " 'assume,' in the sense of 'undertake' to practice as a nurse." AppOpBr/28. However, as the Court of Appeal correctly recognized, an unlicensed school employee who "undertakes" to inject insulin, a medication, into the body of a student, engages in a nursing function in accordance with the plain meaning of the NPA's general prohibition against the unlicensed practice of nursing. MajOpn/19.

The Legislature's enactment of express statutory exceptions to the NPA authorizing unlicensed school personnel to administer glucagon and auto-injectable epinephrine further supports the Court of Appeal's conclusion. EC § 49414.5 (glucagon); EC § 49423 (auto-injectable epinephrine). If the medical order exception to the NPA allows unlicensed school personnel to administer glucagon and epinephrine, then those legislative enactments would not have been necessary. As noted previously, it is assumed that the Legislature does not perform idle acts. *California Teachers Ass'n.*, 14 Cal. 4th at 634.

The Court of Appeal properly rejected Appellant's argument and determined that the medical order exception to the NPA's general prohibition against unlicensed persons administering medication does not apply to allow unlicensed school employees to administer insulin to students. The decision of the Court of Appeal should be affirmed.

2. The Court of Appeal correctly determined that the Education Code does not authorize unlicensed school personnel to administer insulin.

The Court of Appeal properly rejected Appellant's argument that the Education Code authorizes unlicensed school personnel to administer insulin. Appellant asks this Court to reject the Court of Appeal's correct interpretation of Education Code § 49423 in favor of Appellant's own interpretation, which is clearly erroneous and contrary to the plain statutory language. Education Code § 49423 states, in pertinent part, that "any pupil, who is required to take, during the regular school day, medication prescribed for him or her by a physician... *may be assisted by the school nurse or other designated school personnel....*" EC § 49423(a) (emphasis added). Appellant claims that the phrase "may be assisted by the school nurse or other designated school personnel" should be interpreted to grant unlicensed school employees the same authority to administer medications that the NPA grants to nurses by virtue of their license. Appellant's interpretation is incorrect.

Appellant argues that "[t]he Legislature did not draw any distinction between the authority granted to school nurses and the authority granted to unlicensed school personnel."[9] AppOpBr/30. Therefore, Appellant contends, unlicensed school employees must have the same authority to administer medications that licensed health care professionals have. *Id.* Appellant's argument is incorrect on both counts. The Legislature did, indeed, distinguish between school nurses and unlicensed school personnel in the Education Code. The Education Code expressly refers to the school nurse separate and apart from "other designated school personnel." EC § 49423. Moreover, the Education Code limits the manner in which "other designated school personnel" can assist students.[10]

Application of the rules of statutory interpretation exposes the flaws in Appellant's argument. Examining the actual language of the statute to effectuate its purpose, and reading the statutory provisions together "to give effect, when possible, to all the provisions thereof," it is clear that "the word 'assist' in 49423 means to help in whatever way is legally permitted by the specific individual who is doing the assisting." MajOpn/22.

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[9] Registered nurses' authority to administer medications derives from their scope of practice as outlined in the NPA, not from the Education Code.

[10] Furthermore, the NPA distinguishes between the authority of a licensed registered nurse as opposed to that of an unlicensed person.

The ordinary meaning of "assist" is to "aid" or "help." Merriam-Webster's Collegiate Dictionary, 11th ed. (2006), p. 74, col. 2. Appellant identifies many ways in which students may require "help" with administration of insulin as required to treat their diabetic condition. Students with diabetes require around the clock management of their condition to determine whether and how much insulin to give. AppOpBr/5. This can include, among other things: (1) regular monitoring of blood glucose levels by blood glucose testing (*Id.*; 6AA1424); (2) counting carbohydrates at each meal and snack (3AA635); (3) "constant adult-monitoring of activities and evaluation of behavior" (3AA635); (4) implementation of a special meal plan (3AA645); and (5) special access to water and bathrooms (3AA682); in addition to (6) insulin administration and calculation of dosage adjustment (AppOpBr/5).

Construing the plain meaning of Education Code § 49423(a), consistent with the NPA, so as to effectuate the purposes of both, it is clear that unlicensed school personnel are permitted to "assist" diabetic students in ways that fall short of administering insulin which, as discussed, is a nursing function. So, for example, unlicensed school personnel may *assist* students who need insulin by performing tasks 1-5 listed above, but may *not* administer insulin.

Because the plain meaning of the statutory language is clear, it is not necessary to examine extrinsic materials. However, a review of Education

Code § 49423's implementing regulations and CDE's interpretation of the Education Code supports this interpretation.

As required by Education Code § 49423.6, CDE adopted regulations to implement Education Code § 49423. Cal. Code Regs. ("CCR"), tit. 5, section 600. The regulations define "other designated school personnel" who may "assist" students within the meaning of Education Code § 49423. Specifically, 5 CCR § 601(e) states that "designated school personnel" is someone "employed by the local education agency who: (1) has consented to administer the medication the pupil *or* otherwise assist the pupil in the administration of medication; *and* (2) may *legally administer* the medication to the pupil *or otherwise assist the pupil* in the administration of medication." (Emphasis added). This requires a determination of whether a particular school employee "may legally administer" insulin to the student. School nurses and other licensed school employees are authorized to legally administer medications. Unlicensed school personnel may only help students with the administration of medication in other ways. For example, they are permitted to open a bottle of cough syrup and pour the prescribed dose but cannot pour it down the student's throat. 7AA1709.

In accord with this interpretation, CDE issued a Program Advisory on Medication Administration. 2AA483. Therein, CDE "specifically instructed local education agencies that an 'unlicensed staff member does not administer medications that must be administered by injection[.]' "

MajOpn/26 citing 2AA483. CDE affirmed this interpretation in its 2006 publication of "Medication Administration Assistance in California," which answered the question "[c]an unlicensed school personnel administer medication like insulin or rectal diastat to K-12 students in California public schools?" The answer, according to CDE, was a definitive "no." CDE explained that "California law states, with a few clearly specified legal exceptions, that only a licensed nurse or physician may administer medication. In the school setting, these exceptions are situations where:

- The student self-administers the medication;
- A parent or parent designee, such as a relative or close friend administers the medication; or
- There is a public disaster or epidemic.

7AA1709. CDE further explained that, although Education Code §§ 49414 and 49414.5 authorize unlicensed school personnel to administer auto-injectable epinephrine, or glucagon, respectively, "[n]o other California statute allows an unlicensed school employee to administer any other medication in California public schools, even if the unlicensed school employee is trained and supervised by a school nurse or other similarly licensed nurse." CDE elaborated even further, stating:

> EC § 49423 permits the school nurse or other designated school personnel to "assist" students who must "take" medication during the school day that has been prescribed for that student by his or her physician. The terms

> "assist" and "administer" are plainly not synonymous. An example of an unlicensed school employee "assisting" a student pursuant to EC section 49423 would be when the school secretary removes the cap from the medication bottle, pours out the prescribed dose into a cup or a spoon, and hands the cup or spoon to the student, who then "takes" or self-administers the required medication. There is no clear statutory authority in California permitting that same unlicensed school employee to "administer" insulin, diastat, or any other parenteral medication, with the above-stated statutory exception of epinephrine via autoinjector and glucagon.

MajOpn/27; 7AA1709. CDE is the administrative agency charged with enforcing the Education Code. Within the context of this case, its longstanding interpretation of Education Code § 49423, which is evident from its pre-suit publications on the issue, is entitled to deference. *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1, 7 (1998) (an agency's interpretation of the meaning of a statute is entitled to respect, "whether embodied in a formal rule or less formal representation").

Interpreting Education Code § 49423 to permit individuals to help students in whatever way is legally permitted by the person who is doing the assisting is consistent with the Legislature's manifest intent. Education Code § 49427 codifies the legislative intent as: "to ensure that the schools maintain fundamental school health services at a level that is adequate to...(2) meet existing state requirements and policies regarding student health. 49427(a)(2)." One of those state requirements is the state licensing requirement. This legislative intent is further acknowledged in 5 CCR 610,

which expressly states that Education Code §49423's implementing regulations "may not be interpreted as affecting *in any way*, state statues, regulations or standards of practice governing any licensed health care professional." 5 CCR 610 (emphasis added). Accordingly, the Education Code's implementing regulations cannot be interpreted to grant unlicensed school personnel authority to do something that would be a misdemeanor under the NPA.

The meaning of the Education Code § 49423, including its implementing regulations, is clear from the plain language. Unlicensed school employees may not administer insulin to students because they are not legally authorized to do so. Accordingly, the decision of the Court of Appeal should be affirmed.

3. The Court of Appeal properly determined that federal disability laws do not require California students to receive health services from unlicensed school employees when California law ensures that the services will be provided by licensed health care professionals.

The Court of Appeal properly rejected Appellant's argument that California's licensing laws are preempted by Section 504 of the Rehabilitation Act, the Americans with Disabilities Act and the IDEA.

a. Requiring unlicensed school employees to administer insulin is not a necessary accommodation.[11]

As a threshold matter, it is not at all clear that these federal disability laws have been violated, that the accommodations Appellant seeks are necessary or that they are reasonable. A close examination of Appellant's evidence illuminates. For example, the Affidavit of Nicole C. (3AA669-679) states that S.C., a 6-year old student at Turner Elementary School, required "constant adult-monitoring" of activities and evaluation of behavior to watch for early signs and symptoms of hyperglycemia and hypoglycemia (especially during exercise, recreation and socializing); four to six blood glucose tests a day, and as many as 15 additional checks if she shows signs or symptoms of high or low blood glucose; and between four and five injections of insulin by syringe each day and more, on occasion. 3AA635-36. Turner Elementary offered the following reasonable accommodations for S.C.: training two teachers to check S.C.'s blood glucose; adopting a section 504 accommodation plan; giving the student certain snacks when needed; a nurse-developed health care plan; a phone call to a parent if the student had high glucose levels; training office staff,

[11] If the accommodation Appellant requests is unnecessary in the first place, then it is not necessary to determine whether the state law that prohibits the accommodation is preempted by federal law.

the vice principal, teachers and campus supervisors in the signs and symptoms of hypoglycemia and hypoglycemia, and the procedures to follow if symptoms are observed; permitting S.C. to carry her own diabetes supplies; allowing for blood glucose testing whenever necessary, including in the classroom; storing emergency medications and extra supplies in the office or classroom; and providing a trained person to be with S.C. on off campus activities. 3AA653-665. Clearly, accommodations were provided. Notably, though, the affidavit of Nicole C. does not show that S.C. was unable to take advantage of a free, appropriate, discrimination-free education (FAPE) because she could not get insulin at school. The evidence only shows dissatisfaction with the accommodations provided. However, contrary to Appellant's assertion that schools must eliminate every "burden" that diabetic students face as a result of their condition (AppOpBr/59), federal disability laws do not require schools to make every accommodation requested, nor do they demand that schools completely eliminate every disadvantage resulting from a student's disability. *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979).

The Affidavit of Louise D. tells a similar story. Her child, too, requires: "the need to constantly balance insulin dosages with food intake, blood glucose levels and physical activity; constant adult monitoring of his activities and evaluation of his behavior to watch for early signs and symptoms of hyperglycemia and hypoglycemia (especially during exercise,

recreation and socializing), including the signs and symptoms of untreated low blood glucose levels such as confusion, dizziness, weakness, irritability, inability to concentrate, changed personality, changed behavior, drowsiness, headaches, double vision, lack of coordination, inability to swallow, unconsciousness, seizures or convulsions, coma or death, and high blood glucose levels, including headaches, stomach aches, increased thirst, frequent urination, nausea, blurry vision, interference with cognitive abilities and diabetic ketoacidosis (DKA)." 3AA670-671. Reasonable accommodations were made in accordance with the student's diabetes medical management plan and implemented through a 504 Plan. 3AA681-707. The student received his insulin as school, without exception, according to the record. Clearly, the student was not denied a FAPE because the school did not make an unlicensed employee available to administer insulin to him any time he needed it.

"[T]he facts submitted by Appellant [do not] warrant their dramatic conclusion." MajOpn/36. More importantly, they are insufficient as a matter of law to trigger a preemption analysis.

b. The accommodation that Appellant requests is not reasonable.

The record does not demonstrate that the accommodation Appellant requests (i.e., requiring unlicensed school employees to administer insulin) is necessary. However, even assuming, *arguendo*, that accommodation is

necessary, appellant's requested accommodation is not reasonable. Other courts that have considered the issue have so decided.

For example, in *McDavid v. Arthur*, 437 F.Supp.2d 425 (D. Md. 2006), the court considered plaintiffs' request that the county provide personnel at a county-operated before and after care program and summer program to administer insulin and glucagon to their 8-year old child with Type I diabetes. *McDavid*, 437 F.Supp.2d at 426-27. The county refused to administer insulin, arguing that insulin must be administered by a medical professional and the additional cost of having such a professional available would be too burdensome. *Id.* at 427. The court noted, as an initial matter, that, because of the kind of insulin the student received, "it is grossly inaccurate to claim that not receiving insulin at after care will cause the patient to develop diabetic ketoacidosis and to die." *Id.* at 428. The court concluded that plaintiffs' demand to have trained employees present at the child's facility every day was unreasonable. *Id.* The court explained that "to require the county to guarantee the presence of glucagon-trained staff members at all times, would impose undue financial and administrative burdens on the county and fundamentally alter the nature of the [before and after care] program and the summer program's facility. In that regard, the county points out that it would have to train virtually every staff member as to how to administer glucagon, and that it must pay staff members for the hours spent in training. Moreover...at least some of them

might not want to assume the responsibility for administering glucagon." *Id.* at 429. [12]

The court's reasoning in *McDavid* applies here. Indeed, what Appellant wants is exactly what the McDavid's wanted—"someone [to] be constantly available—again immediately present at the scene or no more than a few minutes away—who can administer insulin at all of the times and places, unpredictable as well as predictable, at which a student with diabetes may need insulin." AppOpBr/56.[13] Contrary to Appellant's

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[12] The *McDavid* court also recognized that "[t]he County's position that it is not required to provide Glucagon to children is supported by the Department of Justice's position in its litigation with Kinder Care Learning centers and La Petite Academy, in which the DOJ is charged with the responsibility of enforcing the ADA as applied to state and local governments, did not require either of these nationwide childcare chains to provide Glucagon to children." *McDavid*, 437 F. Supp. 2d at 429, fn.5.

[13] Appellant does not explain how schools can guarantee that someone will always be present to administer insulin, even though, as Appellant admits, students need insulin at unpredictable times. Appellant says only that contracting with licensed personnel cannot "fill the gap," apparently because schools have entered into unwise contracts the terms of which require advance scheduling. AppOpBr/9. The Court of Appeal correctly noted that contracting with licensed personnel would help to alleviate the problem of which Appellant complains. MajOp/36. However, the truth is that it is virtually impossible to do what Appellant suggests (i.e., have someone present within arms' reach of all students with diabetes at all times), regardless of who is administering insulin. *McDavid*, at 437 F. Supp. 2d at 428. Certainly, federal disability laws do not require schools to meet such an impossible demand.

passionate assertions to the contrary, federal disability laws do not require that.[14]

Likewise, in *R.K. v. Bd. of Education of Scott County, Kentucky*, 2010 U.S. Dist. LEXIS 132930, and *B.M. v. Bd. of Education of Scott County, Kentucky*, 2008 U.S. Dist. LEXIS 66645, two cases that are strikingly similar to this one, schools were not required to train unlicensed personnel to administer insulin in violation of the Kentucky Board of Nursing's prohibition against the administration of injections by lay persons, notwithstanding plaintiffs' arguments to the contrary under federal disability laws.

As courts have recognized, schools are not required to provide unlicensed school personnel to administer insulin to students anytime and anywhere they might need it. Therefore, schools' failure to ensure that

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[14] Notably, in *McDavid*, the court further held that the McDavid's requested accommodation was unreasonable because it would require the county to employ medical professionals to administer insulin. *McDavid*, 437 F.Supp.2d at 429. In support of this conclusion, the court relied upon on the affidavit of "a physician board certificate in the field of pediatric[s] and pediatric endocrinology who holds a teaching position in pediatric endocrinology at the Johns Hopkins Hospital." *Id.* at 428. The affidavit established that "the administration of insulin by subcutaneous injection is a medical or nursing practice which should not be undertaken by lay person." *Id.* at 429. This supports Respondents' position that there is no consensus among health care professionals regarding who should be permitted to administer insulin to students in the school setting. Furthermore, the policy opinions of medical associations are not dispositive of this case. It is the Legislature's intent that controls.

someone will be constantly available to students who need insulin by allowing unlicensed school personnel to do so cannot support Appellant's preemption claim.

Because federal disability laws do not require schools to provide unlicensed personnel to administer insulin, state licensing laws (like the NPA) that prohibit lay persons from administering insulin cannot possibly "conflict with or impede implementation of the federal requirements for the administration of insulin by qualified personnel." 8AA2020. However, even assuming, without admitting, that a preemption analysis is necessary, Appellant's arguments fail.

c. Existing law satisfies the requirements of federal disability laws.

Appellant contends that, because there are not enough licensed health care professionals to administer insulin to an unknown number of students who allegedly cannot get it through existing legal options, the NPA's licensure requirement frustrates the purpose of the federal disability laws. Appellant misinterprets preemption law and the Court of Appeal properly rejected its argument.

It is worth noting again, in light of the Court of Appeal's concurrence and the trial court's statements of personal opinion regarding policy, that the record does not clearly demonstrate that any students' federal rights have been violated (i.e., that anyone has been deprived a

FAPE because he or she was denied access to insulin). Accordingly, Appellant's assertion that existing law impedes students' rights is questionable at best. In the end, the Court of Appeal was not persuaded that the state's licensing laws frustrate the purpose of federal disability laws. The Court of Appeal was correct and this court should affirm.

Appellant has the burden of establishing preemption. *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 956 (2004). "An important corollary of this rule, often noted and applied by the United States Supreme Court is that '[w]hen congress legislates in a field traditionally occupied by the states, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of congress." ' " MajOpn/34; *Bronco Wine Co.*, 33 Cal.4th at 956-57. Regulation of health and safety matters, which is at issue here, is primarily and historically a matter of local concern. "California's legislative choice to protect the health and safety of the state's children who suffer from diabetes by limiting the administration of insulin injections at school to licensed individuals or expressly authorized individuals, is an exercise of the state's traditional police power that triggers the presumption against preemption." MajOpn/34, citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *accord Committee of Dental Amalgam Mfrs. & Distribs. v. Stratton*, 92 F.3d 807, 811 (9th Cir.

1996); *Chem. & Specialties Mfrs. Assn., Inc. v. Allenby*, 958 F.2d 941, 943 (9th Cir. 1992).

Moreover, there must be clear evidence of conflict. Tension between federal and state law is legally insufficient to establish preemption. *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 988 (9th Cir. 2007). Preemption only occurs where conflicts "will *necessarily* arise." *Id.* "The existence of a hypothetical or a potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice v. Norman Williams Co.,* 458 U.S. 654, 659 (1982). If it is possible to comply with both federal and state laws, there is no preemption. *Ginochio v. Surgikos, Inc.*, 864 F. Supp. 948, 951 (N.D. Cal. 1994).

Where the federal law's plain language does not speak to preemption, "the court must be guided by the goals and policies of the [federal law] in determining whether" state law is preempted by the federal law based on frustration of purpose. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987). Although "federal law recognizes students with disabilities have a right to receive a free appropriate public education, including related aides and services necessary for them to access that education" (MajOpn/2), "[i]t does not require the perfect elimination of all disadvantage that may flow from the disability; it does not require a lowering of standards," (*Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979)), nor…'fundamental' or 'substantial' modifications in

order to eliminate the disadvantages flowing from the disability." *Fink v. New York City Dep't. of Personnel*, 53 F. 3d 565, 567 (2nd Cir. 1995), citing *Alexander v. Choate*, 469 U.S. 287, 300 (1985). Federal disability laws do not impose an obligation on schools to provide every accommodation requested. They require only that schools make "reasonable modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). The accommodation must not "impose an undue hardship on the operation of [the school's] program." 28 C.F.R. § 41.53.

Appellant concedes that state law identifies seven categories of persons with legal authority to administer insulin to students: (1) the student; (2) a school nurse or physician; (3) a licensed school employee; (4) a contracted registered nurse or a licensed vocational nurse; (5) a parent or guardian; (6) a parent's or guardian's designee, who is not an employee of the LEA; and (7) in emergencies, unlicensed, trained voluntary school employees. These seven reasonable accommodations satisfy the purpose of federal disability laws. *See Debord v. Board of Education*, 126 F.3d 1102, 1106 (8th Cir. 1997); *Davis v. Francis Howell School District*, 138 F.3d 754, 757 (8th Cir. 1998) (permitting parents or others to come to the school to administer medication that the school declines to administer constitutes a reasonable accommodation); *Cercpac v. Health & Hospitals Corp.*, 147

F.3d 165, 168 (2nd Cir. 1998) (finding no ADA or rehabilitation act violation where municipal agency's closing of specialized health care facility would eliminate or reduce some services needed by disabled children and inconveniently relocate other services that those children required; "disabilities statutes do not guarantee any particular level of medical care for disabled persons, nor assure maintenance of service previously provided"). Because the seven existing categories of persons authorized to administer insulin to students meet the requirements of federal disability laws, there can be no preemption.

As the Court of Appeal properly determined, "California law does not frustrate or stand as an obstacle to the purposes of the federal law in assuring students with disabilities free appropriate public education because schools can comply with both the federal law and the California law." MajOpn/38. Accordingly, the Court of Appeal's decision should be affirmed.

d. Appellant's policy arguments do not create a conflict.

Although existing state law authorizing licensed individuals and four categories of unlicensed individuals to administer insulin provides students a meaningful opportunity to receive a free appropriate public education, Appellant wants more. It is unhappy with the accommodations allowed and provided under existing law. This is not because existing accommodations

conflict with or frustrate the purpose of federal disability laws. It is because, at least according to Appellant, schools refuse to furnish the accommodations provided for under state law. *See, e.g.*, 3AA638 (504 Plan not being implemented pursuant to doctor's orders); 3AA676-677 (failure to provide required snack); 5AA1153 (alleged refusal to allow school employees to administer glucagon); 5AA1196 (failure to provide a 504 Plan); 5AA1203 (alleged failure to permit school personnel to administer glucagon, refusal to monitor carbohydrate intake); 5AA1242 (refusal to monitor student's blood glucose testing); 5AA1252 (failure to provide 504 Plan); 5AA1256 (unlicensed school personnel taught student how to unlock insulin pump resulting in life threatening possibility of accidental bolus of insulin).[15] However, these failures do not frustrate the purpose of the federal disability laws. In fact, the record does not demonstrate a single instance in which a student was denied meaningful access to FAPE for any reason.

Clearly, as the Court of Appeal properly determined "Appellant[] [has] not met [its] burden to show it is necessary for unlicensed school personnel to administer insulin to diabetic students in order 'to insure that

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[15] This example demonstrates the wisdom in the Legislature's policy determination that students who need medication during the school day should receive it from licensed personnel. The license matters.

the mandate of federal law is achieved.'" MajOpn/38, citing *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996).

Obviously, Appellant disagrees with the Legislature's policy, affirmatively expressed through its legislative enactments, about how best to protect the health and safety of students with diabetes. However, even Appellant admits that students with diabetes would best be served if licensed personnel managed students' condition during the school day.[16] 5AA1371. Existing state law entitles students with diabetes to that level of care. Appellant should be seeking enforcement of existing state law. Instead, it advocates for a lower standard of care provided by unlicensed school personnel. Federal law does not preempt state law or require the State of California to lower the standard of care for diabetic pupils.

Appellant also urges this Court to find preemption because California is experiencing a budget crisis and school nurses are not available. [17] The record in this case is devoid of evidence supporting any causal connection between an alleged nursing shortage and schools' failure

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[16] "Ideally, each school would have a licensed nurse available at all times to assist students with diabetes with their insulin." 5AA1371.

[17] Appellant claims that licensed personnel are "unavailable" to administer insulin because of a nursing shortage. Respondents contend that the schools make licensed personnel unavailable by refusing to hire or contract with them. Regardless, reasonable accommodations consistent with the NPA are available under existing law, thereby precluding preemption.

to provide reasonable accommodation to students with diabetes.[18] More importantly, fiscal concerns are no excuse to violate the law and cannot create a basis for finding preemption where it is otherwise possible to comply with both federal and state law. Economic concerns should "very properly be addressed to the legislative department of the state government." *Hartzell v. Connell*, 35 Cal.3d 899, 913 (1984) (addressing the free school guarantee under Cal. Const. art. IX §5).

e. Federal law does not prohibit the Legislature from establishing qualifications.

Federal law does not prohibit limiting the administration of insulin to the seven permissible categories. A state statute prohibiting what the federal law "does not prohibit" does not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 992-93 (2004). "[T]here is a difference between (1) not making an activity unlawful and (2) making that activity lawful." *Id.* at 992 (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th

[18] Appellant's mischaracterize Respondents' position to be that "a school nurse, and only a school nurse" can administer insulin. AppOpBr/61. The record reveals the truth. Respondents' position is and has always been that schools must and can comply with both state and federal law by ensuring that students receive their insulin from people who are legally authorized to administer it, regardless of whether they are credentialed school nurses. *See, e.g.*, 7AA1700-02.

163, 183 (1999). In this case, federal disability laws do not prohibit states from imposing licensing requirements for the administration of medication to students. In *Bronco Wine*, the court stated that "California statutes do not mandate, permit or place irresistible pressure on manufacturers to take concerted action... ." *Id.* Similarly here, state licensing requirements do not "mandate, permit or place irresistible pressure" on schools to refuse to accommodate diabetic students.

The Court of Appeal properly rejected Appellant's misplaced reliance on *Crowder v. Kitagawa*, *supra*. In *Crowder*, summary judgment in favor of the State of Hawaii based on a 120-day quarantine of service animals was reversed because it violated the Americans with Disabilities Act by "effectively preclud[ing] visually-impaired persons from using a variety of public services." *Crowder*, 81 F.3d at 1485. However, unlike here, the state in *Crowder*, made no reasonable accommodation "to insure that the mandate of federal law is achieved." *Id.* In this case, California law and CDE have insured that the mandate of federal disability laws is achieved by providing seven categories of individuals authorized to administer insulin to students so that they can take advantage of their right to a FAPE. As the Court of Appeal properly determined, Appellant failed to satisfy its burden to show that existing accommodations are inadequate, thereby necessitating authorization for unlicensed school personnel to administer insulin. MajOpn/38.

Undeterred, Appellant argues that it has demonstrated preemption "*specifically when a school nurse or other licensed person is unavailable.*" AppOpBr/56. Appellant contends that, even though state law and CDE have made reasonable accommodations by providing seven categories of individuals legally authorized to administer insulin to students, preemption exists any time a licensed individual is not available. Appellant's argument ignores completely the fact that existing law already provides for four categories of unlicensed persons legally authorized to administer insulin: the student, a parent/guardian, a parent's/guardian's designee, and an unlicensed voluntary school employee in epidemics or public disasters.

The Legal Advisory purports to require that schools make unlicensed school personnel available to administer insulin *even if* another person who is already authorized under the law to administer insulin is available. There is no legal authority to support Appellant's misguided interpretation of preemption law. There can be no preemption where the state has provided seven different categories of individuals, both licensed and unlicensed (but authorized by existing law), from whom students can receive insulin at school, thereby making it possible for schools to comply with both the federal law and the California law. Federal disability law does not require schools to reject accommodations authorized under state law in favor of different accommodations prohibited by state law. Appellant's argument to

the contrary should be rejected and the Court of Appeal's decision should be affirmed.

B. The Position Advocated By Appellant Would Establish Bad Law And Bad Policy.

Appellant's notions of sound public policy are irrelevant. Only the Legislature's policy determinations, conveyed through its legislative enactments, are relevant to this Court's determination of the issues. The Legislature's intent controls, "as exhibited by the plain meanings of the actual words of the law, whatever may be thought of the wisdom, expediency, or policy of the act." *California Teachers Ass'n.*, 14 Cal.4th at 632. As the Court of Appeal properly noted, "[i]t is for the Legislature, not the courts, to pass upon the social wisdom of such [legislation]." *Neighbors v. Buzz Oats Enterprises*, 217 Cal.App.3d 325, 334 (1990).

Appellant's view of good public policy is especially irrelevant in this case, where competing policy considerations weigh against the statutory interpretations Appellant urges this court to adopt. For example, public policy and, indeed, Congress's expressed intent in enacting federal disability laws, dictate that those laws should not be used to lower the standard of care for individuals with disabilities, the class of persons who

the statutes were enacted to protect.[19] *See, e.g.*, 42 USC § 12101(b) (purpose of the American's with Disabilities Act); 29 USC §701(b) (purpose of the Rehabilitation Act); 20 USC §1400 (purpose of IDEA).

Radically expanding the responsibilities of unlicensed school personnel to include providing health care services to students is also questionable policy, at best. Certainly, the California Legislature did not see the wisdom in it. Likewise, abrogating the Nursing Practice Act in the school setting establishes questionable precedent and begs the question whether licensing laws governing other healthcare professionals also do not apply in the school setting. For example, will a lay person be able to perform traditional medical functions, notwithstanding the medical practice act (BP § 2052)? Will school guidance counselors be asked to do psychotherapy, even if they are not licensed to do so under the California psychology licensing law (BP § 2901)? Perhaps physical education teachers will be able to do physical therapy, even though they are not licensed to do so under California's physical therapy licensing law (BP § 2636). Abrogating health care licensing laws in California's schools is a slippery slope.

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[19] California law reflects the same intent. Gov't. Code § 11135; EC § 56000, et seq.

Extending the rulemaking authority of the California Department of Education to regulation of health care professions and professionals would be equally misguided. After all, administrative agencies have only those powers that are conferred by the law creating them. *AFL v. Unemployment Ins. Appeals Bd.*, 13 Cal.4th 1017, 1042 (1996). Neither the California Constitution nor the California Legislature saw fit to give CDE authority to regulate nursing practice, medical practice or anything else, outside of education. Moreover, the Legislature has limited CDE's rulemaking power even in the context of education, by providing that the rules and regulations adopted by the State Board of Education may not be inconsistent with state laws. EC §33031; *Mattieson v. State Board of Education*, 57 Cal.App.2d 991 (1943); *Dean v. Clarke*, 53 Cal.App. 30 (1921) (a rule issued by the State Board of Education is of no effect if it conflicts with an act of the Legislature). The limits placed on CDE's rulemaking powers suggest that extending those powers to regulation of other industries would be contrary to public policy, in addition to a violation of existing law.

Certainly, state agencies should not be permitted to exceed the scope of their regulatory authority by rewriting statutes and substituting their judgment for that of the Legislature by entering into settlement agreements with private litigants. That is exactly what CDE did in this case. If the California Department of Education can rewrite health care licensing

statutes by entering into a settlement agreement with private litigants, then what stability is there in the law?

Adopting Appellant's absurd interpretation of the NPA and Education Code also would establish bad law. For example, it would create inconsistencies between the definition of "administer" in the Uniform Controlled Substances Act, pharmacy law, the NPA and the Education Code. It would render Education Code sections 49423(b) (epinephrine) and 49415 (glucagon) unnecessary, redundant of section 49423(a) and meaningless. It would redefine "designated school personnel" under 5 CCR 601 by essentially striking section 601(e)(2). It also would expand the scope of CDE's rulemaking authority by granting it power that the Legislature has not seen fit to give it, in violation of Education Code § 33031. Furthermore, it will be the first time of which Respondents are aware that federal disability laws have "trumped" state health care licensing laws, thereby turning the law of preemption on its head.

The Court of Appeal properly understood that Appellant's notion of good public policy is not relevant to this case. This Court should likewise decline to adopt Appellant's public policy arguments to redefine existing law that is clear on its face.

C. In The Event Of A Reversal, The Case Should Be Remanded To The Court Of Appeal To Decide Whether The Legal Advisory Violates The APA.

1. The trial court ruled that the Legal Advisory is an unlawful regulation in violation of the Administrative Procedure Act.

The trial court found that "[t]he portion of the Legal Advisory sanctioning the administration of insulin to students by school personnel not authorized to do so under state statute is a regulation that has not been adopted in accordance with the rulemaking procedures…[of the APA]…and therefore is invalid." 8AA2021. The trial court also found that CDE lacked "legal authority under state and federal laws to enlarge the group of persons who may administer insulin under state statute." *Id.* The trial court's ruling was not disturbed by the Court of Appeal. However, the Court of Appeal did not reach the APA issue, because its interpretation of the NPA and Education Code settled the case. Appellant did not raise the APA issue on appeal to this court. Accordingly, in the event that this Court reverses, the APA issue must still be decided by the Court of Appeal, unless this Court elects to consider the issue itself, pursuant to California Rules of Court ("CRC"), Rule 8.516.

2. Pursuant to California Rule of Court 8.516, this Court should consider whether the Legal Advisory violates the Administrative Procedure Act.

The Supreme Court has the power to decide issues necessary for the proper resolution of the case, even if those issues are not raised in the petition for review. California Rule of Court 8.516(b)(2) provides that "[t]he court may decide an issue that is neither raised not fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." CRC 8.516(b)(2). Here, the APA issue was extensively briefed and argued before the Court of Appeal. Further briefing is not required and the issue can be argued and decided by this Court when it decides the merits of the issues Appellant did see fit to raise. In so doing, the Court will serve the interests of judicial economy and expediency which, in turn, will benefit all parties.

CONCLUSION

For the reasons stated herein, the decision of the Court of Appeal should be affirmed.

Dated: January 21, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), I certify that the text of the foregoing Respondents' Answer Brief on the Merits contains 11,903 words as counted by the Microsoft Word Processing program used to generate this brief.

Dated: January 21, 2011

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Docket No. S184583

PROOF OF SERVICE BY MAIL

I, David A. Kramlick, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the City of San Francisco, California.

2. My business address is 50 Fremont Street, San Francisco, CA 94105-2228. My mailing address is 50 Fremont Street, P. O. Box 7880, San Francisco, CA 94120-7880.

3. I am familiar with Pillsbury Winthrop Shaw Pittman LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service; in the ordinary course of business, correspondence placed in interoffice mail is deposited with the United States Postal Service with first class postage thereon fully prepaid on the same day it is placed for collection and mailing.

4. On January 21, 2011, at 50 Fremont Street, San Francisco, California, I served true copies of the attached document titled exactly RESPONDENTS' ANSWER BRIEF ON THE MERITS by placing them in addressed, sealed envelopes clearly labeled to identify the persons being served at the addresses shown below and placed in interoffice mail for collection and deposit in the United States Postal Service on that date following ordinary business practices:

[See Attached Service List]

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of January, 2011, at San Francisco, California.

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