No. C061150

In The Court Of Appeal Of The State Of California
Third Appellate District

AMERICAN NURSES ASSOCIATION et al.,
Plaintiffs and Respondents,

vs.

JACK O'CONNELL et al.,
Defendants and Appellants,

AMERICAN DIABETES ASSOCIATION,
Intervener and Appellant.

REPLY BRIEF OF APPELLANT AMERICAN DIABETES ASSOCIATION

Appeal From A Judgment On A Complaint And A Petition For Writ Of Mandate
Sacramento County Superior Court, No. 07AS04631
Honorable Lloyd G. Connelly

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I. INTRODUCTION

In its opening brief, in which appellants California Department of Education (CDE) and Superintendent of Public Instruction Jack O'Connell (Superintendent) subsequently joined, appellant American Diabetes Association (ADA) showed that the trial court erroneously rendered judgment in favor of respondents American Nurses Association and other registered nurse organizations, invalidating a portion of a Legal Advisory issued by the CDE.

In making that showing, ADA established the following points:

First, federal anti-discrimination law grants students with diabetes a right to a free appropriate public education, with an accompanying right of access to the administration of insulin to enable them actually to obtain such an education.

Second, thousands of students with diabetes attend California public schools and must take insulin at several times, unscheduled as well as scheduled, throughout the day in order to survive.

Third, many of these thousands of students with diabetes need someone to administer insulin to them—either the school nurse, who is by definition a registered nurse, if there is one, or some other school personnel, if there is not.

Fourth, there is a severe shortage of school nurses and of registered nurses generally in California—a shortage that has existed for years and will extend into the foreseeable future.

Fifth, in light of the severe nursing shortage, if students with diabetes are to have anyone available to administer insulin, they must depend upon school personnel who are not registered nurses or licensed health care professionals of any sort—unlicensed school personnel.

Sixth, even apart from the severe nursing shortage, students with diabetes must depend upon unlicensed school personnel, inasmuch as the school nurse cannot attend to all students with diabetes, less still all students generally, whenever each student needs assistance.

Seventh, unlicensed school personnel can be trained to administer insulin safely, just as other unlicensed persons have routinely been trained to do so for years.

Eighth, state education law authorizes unlicensed school personnel to administer insulin to students with diabetes, and state nursing law does not prohibit them from doing so. The fact becomes apparent when state education and nursing law is considered in itself. And it is confirmed when state education and nursing law is considered against the background of federal anti-discrimination law granting students with diabetes the right to a free appropriate public

education with an enabling right of access to the administration of insulin.

And ninth, in stating that, in the absence of a school nurse or other licensed person, unlicensed school personnel who are adequately trained may administer insulin to students with diabetes pursuant to the detailed orders of the student's physician and with the consent of the student's parent, foster parent, or guardian, the Legal Advisory embodies an interpretation of state education and nursing law that amounts to a substantively correct reading of such law and indeed constitutes the only tenable one.

How do respondents address these points in their effort to preserve the trial court's judgment from reversal? They ignore the true facts in favor of "facts" of their own imagining; they twist state education and nursing law beyond the breaking point; and they treat federal anti-discrimination law as though it did not exist. Because they do so, their effort to save the judgment fails. This Court should accordingly reverse.[1]

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[1] In this brief, we use the following abbreviations for the documents indicated, which have previously been filed in this Court: "AA" for the Appellant's Appendix; "AOB" for the Appellant's Opening Brief; "RB" for the Respondents' Brief; and "RT" for the Reporter's Transcript.

II. RESPONDENTS FAIL TO SALVAGE THE JUDGMENT

To salvage the trial court's judgment, respondents have to save the court's two underlying conclusions.

The trial court concluded that, to the extent it states that unlicensed school personnel are authorized to administer insulin to students with diabetes, the Legal Advisory is invalid because: (1) it (a) conflicts with the Nursing Practice Act [Bus. & Prof. Code § 2700 et seq.], including specifically Business and Professions Code section 2725, and (b) is not supported by Education Code section 49423 [RT/55-60; 8AA/2019-20]; and (2) it constitutes a "regulation" within the meaning of the Administrative Procedure Act (APA) [Gov't Code § 11340 et seq.] that was not adopted in compliance with the APA's procedural requirements [8AA/2021].

As we show below, respondents fail to save either of the trial court's conclusions.

A. Clearing The Legal And Factual Brush

Before turning to respondents' arguments attempting to salvage the trial court's judgment, we must first clear the considerable factual and legal brush that surrounds them.

1. ADA May Properly Raise All Of The Arguments It Has Presented

Let us first clear the legal brush.

In an evident effort to avoid addressing what they cannot meet, respondents claim, time and again, that we did not raise various arguments in the trial court involving the proper interpretation or application of the federal and state statutory provisions at issue, and that, as a result, we may not raise any of those arguments in this Court. (RB/21, 30, 38, 47)

But contrary to the claim, the record reflects that, expressly or by implication, we raised all of the arguments in question below. (3AA/600-17; 7AA/1718-28; *see also* 5AA/1357-72)

In any event, we would not be barred from raising any of those arguments here. A party is not "precluded" from raising an argument "for the first time on appeal" when the argument "involves a legal question ...." *Rowe v. Exline*, 153 Cal.App.4th 1276, 1287-88 (2007); *accord, e.g., Martorana v. Marlin & Saltzman*, 175 Cal.App.4th 685, 700-01 (2009). The arguments at issue present "questions of law," implicating as they do the proper interpretation and application of statutory provisions. *Californians for Population Stabilization v. Hewlett-Packard Co.*, 58 Cal.App.4th 273, 294 (1997) (the "interpretation of ... [a] statute ... and its application ... are questions of law"). Respondents expressly admit as much, conceding that "this appeal involves pure questions of law." (RB/9)

2. Insulin Can Be, And Is, Administered Safely By Unlicensed Persons—Including Unlicensed School Personnel

Let us next clear the factual brush.

Respondents claim that there is no basis for concluding that there is a crisis in California public schools involving the administration of insulin to students with diabetes, asserting that we have failed to establish either that there are many students with diabetes or that there were few school nurses and other registered nurses available to assist them. (RB/6-7, 7 n.4, 45 n.41)

The claim blinks reality.

The record reflects the following facts established beyond any reasonable dispute:

About one in every 400 to 500 children has diabetes and must take insulin at several times, unscheduled as well as scheduled, throughout the day in order to survive. (3AA/713; 6AA/1410, 1415)

In 2003, there were some 15,000 students with diabetes in California public schools. (6AA/1397) At the same time, there was a severe shortage of registered nurses in the state generally and of school nurses in particular, with fewer than 2,700 school nurses available to assist more than 6,000,000 students. (6AA/1399)

By 2007, the shortage of registered nurses generally and of school nurses in particular had become even more severe, with only 2,800 school nurses to assist some 6,300,000 students. (6AA/1493-94, 1496-1500)

In the coming years, the number of registered nurses available to become school nurses will prove insufficient, inasmuch as that number may fall as many as 60,000 registered nurses short of the state's needs. (6AA/1505) But even if the number of registered nurses available to become school nurses turned out to be sufficient, it would hardly matter. Although respondents urge this Court to put its head in the sand [RB/11 & n.7], there is indeed an " 'unprecedented fiscal crisis' " now gripping the state as a whole and its public schools specifically. California Department of Education, Budget Crisis Report Card, *available at* http://www.cde.ca.gov/nr/re/ht/bcrc.asp (as of Dec. 14, 2009). That means that, even if the number of registered nurses available to become school nurses turned out to be sufficient, the money available to pay them would not.

In the face of these facts, respondents continue to insist that there is no crisis in California public schools involving the administration of insulin to students with diabetes or that any such crisis is irrelevant to any of the issues before this Court. They demand information even more detailed than that already contained in the record identifying precisely *which* students will not receive needed insulin under their interpretation of the law. Notwithstanding their demand, they cannot reasonably dispute what the record establishes,

that is, that *some* students will not receive needed insulin. And notwithstanding their assertion, the "real issue" in this case is not "*from whom*" students with diabetes "must receive their insulin," but "*whether*" they "will receive their insulin" *from anyone.* (RB/1 n.1 (italics added in place of underscoring in original))

But even if the number of school nurses were sufficient to fully staff California public schools, the crisis involving the administration of insulin to students with diabetes would remain. That is because many students with diabetes need insulin several times each day, including at scheduled and unscheduled times during school, and a school nurse will not always be able to administer insulin to each student when he or she needs it. For example, the student may be away from the school site on a field trip or in an extracurricular activity. (3AA/723-24; 6AA/1652; *see* 3AA/604-05) Similarly, the school nurse may be away from the school site as he or she travels substantial distances between schools in rural school districts or is delayed by traffic between schools in urban school districts. (3AA/796-97; *see* 3AA/604-05) Or both the student and the school nurse may be at the school site, but the school nurse may be unable to administer insulin to the student because he or she is administering insulin to another student (as often occurs around lunchtime) or otherwise attending to another student. (3AA/630, 640; 6AA/1652; *see* 3AA/604-05)

Respondents also claim that unlicensed school personnel cannot safely administer insulin. (RB/5-6) The administration of insulin,

they tell us, is "complicated." (RB/5) Worse still, they add, the administration of insulin is "dangerous." (*Id.*) So "complicated" and "dangerous," they conclude, that some hospitals require *two* registered nurses to participate in the administration of insulin to patients. (*Id.* (citing 1AA/259))

This claim too blinks reality.

Contrary to its implication, persons with diabetes do *not* need to have two registered nurses in tow to take insulin safely. Indeed, respondents effectively admit as much, recognizing that various persons who are unlicensed can administer insulin safely—including the babysitters of foster children and even children themselves. (RB/6-7, 29-30)

In California public schools, insulin is administered to students with diabetes in accordance with the detailed orders of the student's physician. Ed. Code § 49423(b)(1). The actual administration of insulin involves two tasks: assessing the correct dose and then delivering that dose. (3AA/721) Assessing the correct dose does not require a substantial amount of scientific knowledge or technical skill; it requires only following the physician's detailed orders. (3AA/721-22; 6AA/1647-48, 1649-50) Neither does giving the correct dose require a substantial amount of scientific knowledge or technical skill; it requires only the manipulation of a hypodermic syringe, insulin pen, or insulin pump—a skill that is within the capacity of some elementary-school-aged children. (3AA/722; 6AA/1648-49)

It is a fact, ignored by respondents, that unlicensed persons can be trained, and routinely have been trained, to administer insulin safely—including unlicensed school personnel. (4AA/844; 6AA/1647-52, 1667-68).

For example, Linda Siminerio, R.N., Ph.D., the Director of the University of Pittsburgh Diabetes Institute and a Certified Diabetes Educator for almost 30 years, testified that she had "successfully—and routinely—taught all of [the] tasks" necessary for safe administration of insulin to "people of all education backgrounds," including persons "with severe mental challenges," and "even to children." (6AA/1648)

Similar testimony was given by Francine Kaufman, M.D., a board-certified pediatric endocrinologist in practice for almost 30 years, who served as the Director of the Comprehensive Childhood Diabetes Center, the Head of the Center for Endocrinology, Diabetes and Metabolism at Children's Hospital, Los Angeles, and a Distinguished Professor of Pediatrics and Communications at the Keck School of Medicine and the Annenberg School of Communications of the University of Southern California. Dr. Kaufman testified that unlicensed persons "can be and routinely are trained to administer diabetes medications, including insulin." (3AA/720)

The testimony given by Dr. Kaufman and Dr. Siminerio is proof against challenge. It is consistent with the position taken by the

United States Department of Health and Human Services. (4AA/844) It is consistent as well with the position of the American Academy of Pediatrics, American Association of Clinical Endocrinologists, Pediatric Endocrine Nursing Society, American Association of Diabetes Educators, and Juvenile Diabetes Research Foundation. (6AA/1652)

Not only is it a fact that unlicensed persons—including school personnel—can be trained, and routinely have been trained, to administer insulin safely [4AA/844; 6AA/1647-52, 1667-68], it is also a fact, similarly ignored by respondents, that registered nurses and other licensed persons are not infallible, and indeed are no less likely to make a mistake in administering insulin [6AA/1647].

A final point: It may well be, as respondents assert, that some hospitals may require two registered nurses to participate in the administration of insulin to patients. Any such fact, however, says nothing about whether unlicensed school personnel can safely administer insulin to students with diabetes. Unlike students, patients are ill, often more sensitive to variations in insulin dosage, unstable in their insulin needs, and subject to treatment by many different individuals on multiple shifts. (3AA/722-23) As a result, the regime that may be required in a hospital is not required in a school. (*Id.*)

B. Contrary To Respondents' Claim, The Legal Advisory Is Valid Because It Is Consistent With Education Code Section 49423 And Does Not Conflict With Business and Professions Code Section 2725

Respondents attempt to save the first of the trial court's two conclusions underlying its judgment—that to the extent it states that unlicensed school personnel are authorized to administer insulin to students with diabetes, the Legal Advisory conflicts with Business and Professions Code section 2725 and is not supported by Education Code section 49423, and is therefore invalid.

We address each of respondents' arguments below. Before doing so, however, we emphasize two points—one about Education Code section 49423 in itself, the other about the provision in its context.

As we showed in our opening brief and will show again here, Education Code section 49423 authorizes the administration of medication to students, including insulin, as well as help with self-administration. By whom? Education Code section 49423 identifies not only the "school nurse" but also "other ... school personnel." Ed. Code § 49423(a). In making their arguments, respondents all but read "other ... school personnel" [*id.*] out of the provision.

As we also showed in our opening brief and will show again here, Education Code section 49423 must be interpreted in the context of controlling federal anti-discrimination law, which grants students

with diabetes a right to a free appropriate public education, with an enabling right of access to the administration of insulin. To the extent they touch on this fact at all, respondents place themselves distinctly at odds with the federal law in question.

1. Federal Anti-Discrimination Law Gives Students With Diabetes A Right To A Free Appropriate Public Education, With An Enabling Right Of Access To The Administration Of Insulin

In our opening brief, we showed that Section 504 of the Rehabilitation Act of 1973 (Section 504) [29 U.S.C. § 794], Title II of the Americans with Disabilities Act (Americans with Disabilities Act) [42 U.S.C. § 12101 et seq.], and the Individuals with Disabilities Education Act (IDEA) [20 U.S.C. § 1400 et seq.] grant students with diabetes a right to a free appropriate public education, with an enabling right of access to the administration of insulin. (AOB/22-25)

Respondents would have this Court believe that Section 504, the Americans with Disabilities Act, and the IDEA—which they curiously avoid mentioning in their argument—do not grant students with diabetes any rights, but merely offer them whatever "accommodation" a school district might happen to deem "reasonable." (RB/41-46)

Not so.

Section 504 and the Americans with Disabilities Act require school districts to provide a "free appropriate public education" to

students with disabilities, including diabetes. 34 C.F.R. § 104.33(a); *see, e.g., Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 253 (3rd Cir. 1999) (noting that "[t]here are few differences, if any, between" Section 504 and the IDEA).

Likewise, the IDEA—which respondents fail to discuss despite its central role—requires school districts to provide a free appropriate public education to such students. 20 U.S.C. §§ 1400(d), 1414(d).

As a result, Section 504, the Americans with Disabilities Act, and the IDEA all require a "free appropriate public education." *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 125 (1st Cir. 2003).

Moreover, Section 504 and the IDEA require school districts to furnish such students with all related aids and services they need, whatever such aids and services may be [*see* 20 U.S.C. § 1401(26)(A); *see also Smith v. Robinson*, 468 U.S. 992, 1017-18 n. 20 (1984)], and to do so at no cost [34 C.F.R. § 104.33(b)(1), (c)(1)], in order to provide such students with "meaningful access to education" [*Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 891 (1984)]. The related aids and services in question—which include the administration of insulin—are not "accommodations" that school districts need provide to such students only if they happen to deem them "reasonable"; instead, these aids and services are *required* whenever such students need them in order to receive a free appropriate public education. *See Cedar Rapids Community School Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 73-79 (1999).

None of the decisions that respondents cite in support of their "reasonable accommodation" argument proves of any value to their position. That is scarcely surprising, since "reasonable accommodation" is a concept alien to the rights granted to students with disabilities by Section 504, the Americans with Disabilities Act, and the IDEA. Indeed, "reasonable accommodation" does not appear in any of these three statutes or in any of their implementing regulations in the context of education.

Specifically, *Cercpac v. Health and Hospitals Corp.*, 147 F.3d 165 (2d Cir. 1998), *Sharpe v. American Tel. & Tel. Co.*, 66 F.3d 1045 (9th Cir. 1995), and *Fink v. New York City Dept. of Personnel*, 53 F.3d 565 (2d Cir. 1995), have nothing at all to do with education. *Cercpac* involves health care in public medical facilities, and *Sharpe* and *Fink* involve private and public employment, respectively. *See Cercpac*, 147 F.3d at 166; *Sharpe*, 66 F.3d at 1047; *Fink*, 53 F.3d at 566.

For their part, *Davis v. Francis Howell School Dist.*, 138 F.3d 754 (8th Cir. 1998), and *DeBord v. Board of Educ. of Ferguson-Florissant School Dist.*, 126 F.3d 1102 (8th Cir. 1997), hold only that students with attention deficit hyperactivity disorder do not have a right to the administration of Ritalin in an amount that is in excess of the recommended dosage and potentially harmful, and that school districts need only allow the parents of such students to come to school once during the day to administer the excess amount themselves. *See Davis*, 138 F.3d at 755-57; *DeBord*, 126 F.3d at

1103-06. Here, there is no dispute that students with diabetes require insulin several times a day or that the insulin to be administered conforms to the recommended dosage and is needed to prevent harm. Furthermore, to the extent that *Davis* and *DeBord* might be read to hold that a school district may justifiably refuse to provide needed services to students with disabilities, they have effectively been overruled by *Cedar Rapids Community School Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. at 73-79. In any event, *Davis* and *DeBord* do not undermine the right of students with diabetes to access to the administration of insulin *in a proper and safe amount necessary to prevent harm to the individual student.*

Respondents therefore fail to refute our showing that Section 504, the Americans with Disabilities Act, and the IDEA grant students with diabetes a right to a free appropriate public education, with an enabling right of access to the administration of insulin.

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

In our opening brief, we showed that Education Code section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes. (AOB/25-35)

Respondents, as will appear, fail to refute that showing.

a. The Language Of Education Code Section 49423 Authorizes Unlicensed School Personnel To Administer Insulin To Students With Diabetes

In our opening brief, we demonstrated that the language of Education Code section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes. (AOB/25-30)

By way of background, Education Code section 49423 provides that a student "who is required to take, during the regular schoolday, medication prescribed for him or her by a physician or surgeon may be assisted by the school nurse or other designated school personnel." Ed. Code § 49423(a).

Education Code section 49423 is implemented by regulations that the CDE adopted under the authority of Education Code section 49423.6. *See* 5 Cal. Code Regs. § 600 et seq. Education Code section 49423.6 required the CDE to "adopt regulations"—which it did—"regarding the administration of medication in the public schools pursuant to Section 49423" to "address[ ] a situation where a pupil's parent or legal guardian has initiated a request to have a local educational agency dispense medicine to a pupil." Ed. Code § 49423.6.

Back to Education Code section 49423.

Who is authorized to act under Education Code section 49423 is clear: *The "school nurse" and "other school personnel."* A "school nurse" must be licensed—indeed, he or she must be a "licensed registered nurse." 5 Cal. Code Regs. § 601(h). "Other school personnel" need not be licensed.

What the school nurse and unlicensed school personnel are authorized to do under Education Code section 49423 is also clear: *"Medication."* "Medication" includes both prescription and non-prescription "substances." 5 Cal. Code Regs. § 601(b). Such "substances," in turn, include insulin. Education 49423 does not draw any distinction between the authority to administer insulin and the authority to administer any other medication.

How the school nurse and unlicensed school personnel are authorized to act under Education Code section 49423 is clear too: *"Assist."*

It bears emphasis that Education Code section 49423 does *not* authorize the school nurse alone to *administer* medication, and does *not* authorize unlicensed school personnel merely to *help with self-administration*.

Rather, Education Code section 49423 authorizes the school nurse to "assist" with medication. It is undisputed and indisputable that by authorizing the school nurse to "assist" with medication, the provision authorizes the school nurse to administer medication as well

as help with self-administration. Inasmuch as the provision also authorizes unlicensed school personnel to "assist" with medication, it necessarily authorizes such personnel to administer medication as well as help with self-administration. Put simply, what "assist" means for school nurses, it means for unlicensed school personnel too. Otherwise, the same verb in a single sentence would carry different meanings—an absurd result.

This meaning is reflected throughout the regulations implementing Education Code section 49423: The school nurse and unlicensed school personnel "may administer medication ... or *otherwise* assist ... in the administration of medication[.]" 5 Cal. Code Reg. § 604(a), (b) (italics added); *accord* 5 Cal. Code Reg. §§ 600(b), 601(c), 601(d)(4), 601(e), 603(a)(3), 603(a)(4), 603(a)(5), 604(c), 604(d), 607, 610(b), 611. To speak of "administering ... or *otherwise* assisting" means that "assisting" is the *including* term and "administering" is the *included* term. Therefore, "*assisting* ... in the administration of medication" includes administering medication as well as helping with self-administration.

This meaning is supported by well by Education Code section 49423.6, under whose authority the CDE adopted the regulations implementing Education Code section 49423. As noted, Education Code section 49423.6 required the CDE to "adopt regulations ... regarding the *administration of medication* in the public schools pursuant to Section 49423" to "address[ ] a situation where a pupil's parent or legal guardian has initiated a request to have a local

educational agency *dispense medicine* to a pupil." Ed. Code § 49423.6 (italics added). In light of the italicized language providing for the "administration of medication" and the "dispens[ing]" of medicine," it would be unreasonable to read Education Code section 49423 to authorize unlicensed school personnel as well as the school nurse to help with self-administration of medication but not actually to administer medication.

Unwilling to accept that the language of Education Code section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes, respondents argue that the language restricts the authority of such personnel to helping with self-administration. (RB/34-40)

Respondents initially assert that the authorization granted by Education Code section 49423 for students to "self-administer prescription auto-injectable epinephrine" [Ed. Code § 49423(a)], along with the analogous authorization granted by Education Code section 49423.1 for them to "self-administer inhaled asthma medication" [Ed. Code § 49423.1(a)], supports restricting the authority of unlicensed school personnel to helping with self-administration. (RB/34-35)

To begin with, the authorization granted *to students* to self-administer prescription auto-injectable epinephrine or inhaled asthma medication does not purport to restrict the authority *of the school nurse or unlicensed school personnel* with respect to administering

those or any other medications or to helping with self-administration. By its terms, the authorization granted to students to self-administer those medications instead limits the power of school districts to prohibit self-administration by students. *See* Ed. Code §§ 49423(a), 49423.1(a).

Moreover, even though one may presumably "assist" a student with self-administering prescription auto-injectable epinephrine or inhaled asthma medication only by helping the student with self-administration, that is true of the school nurse as well as unlicensed school personnel. But as explained, one may "assist" a student with medication by administering the medication as well as by helping with self-administration.

Perhaps most important, Education Code section 49423 draws no distinction between the school nurse and unlicensed school personnel with respect to "assisting" a student with self-administering prescription auto-injectable epinephrine or inhaled asthma medication. Therefore, the provision furnishes no basis for concluding that the school nurse may do more than unlicensed school personnel or that unlicensed school personnel may do less than the school nurse.

Furthermore, the very reference to "self-administration" discloses that, had the Legislature intended to restrict the authority of unlicensed school personnel to helping with self-administration, it had language at hand to accomplish the task. By failing to use such language—that is to say, by failing to restrict their authority to helping

with self-administration—it revealed that it had no such intent. *See, e.g., Grubb & Ellis Co. v. Bello*, 19 Cal.App.4th 231, 238-39 (1993) (by failing to use language requiring mutuality of remedy of arbitration to make a statutorily-mandated arbitration provision valid, the Legislature revealed that it had no intent to impose that requirement).

More broadly, Education Code section 49423 draws no distinction between the school nurse and unlicensed school personnel with respect to administering medication to students or helping them with self-administration. Again, the Legislature could have inserted such a distinction into the provision; by failing to do so, it revealed it intended no such distinction.

In Education Code section 49423, the Legislature made its intent plain: Unlicensed school personnel as well as the school nurse may administer medication to a student as well as help with self-administration, *provided only* that the school district "obtain both a written statement from the physician detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken and a written statement from the parent, foster parent, or guardian of the pupil indicating the desire that the school district assist the pupil in the matters set forth in the statement of the physician." Ed. Code § 49423(b)(1). Therefore, for both the school nurse and unlicensed school personnel, the provision requires a written statement from the student's physician and a written statement from his or her parent, foster parent, or guardian. It does not require

more for unlicensed school personnel, nor does it require less for the school nurse, with respect to either administering medication or helping with self-administration.

On a related point, respondents assert that "other ... school personnel" referred to in Education Code section 49423 must be interpreted to mean "other *licensed* school personnel." (RB/38-39) Here too, the Legislature had language available to convey that meaning—the simple word "licensed"—but chose not to use it.

To avoid that conclusion, respondents rely upon language in the regulations implementing Education Code section 49423: "Other school personnel may administer medication ... or otherwise assist ... in the administration of medication *as allowed by law*." 5 Cal. Code Regs. § 604(b) (italics added). "Other ... school personnel" are defined to include persons who, among other things, "[m]ay *legally* administer the medication ... or otherwise assist ... in the administration of the medication." 5 Cal. Code Regs. § 601(e)(2) (italics added). Relying upon this language, respondents claim that "other ... school personnel" must be interpreted to mean "other *licensed* school personnel."

Respondents' claim collapses because their reliance proves to be misplaced.

It goes without saying that the regulations implementing Education Code section 49423 must respect the authority that the

provision grants to unlicensed school personnel. If the provision grants authority to unlicensed school personnel, its implementing regulations cannot restrict that authority to *licensed* school personnel. *See, e.g., California Assn. of Psychology Providers v. Rank*, 51 Cal.3d 1, 11 (1990) (" 'Administrative regulations that alter or amend the statute ... or impair its scope are void[.]' ").

The regulations implementing Education Code section 49423 do indeed respect the authority granted to unlicensed school personnel. Unlike respondents, we quote the relevant language of the implementing regulations in full: "Other ... school personnel may administer medication ... or otherwise assist ... in the administration of medication as allowed by law and, *if they are licensed health care professionals*, in keeping with applicable standards of professional practice for their license." 5 Cal. Code Regs. § 604(b) (italics added). The italicized condition is significant: It means that "other ... school personnel" *may happen to be* licensed *but need not be.*

Why then do the regulations implementing Education Code section 49423 state and imply that "other ... school personnel" may administer medication, or otherwise assist in the administration of medication, *in accordance with the law*? Even though, under Education Code section 49423, unlicensed school personnel have authority to administer medication generally, under other law they may be subject to specified training standards when they do so under specified circumstances. One example is close at hand. Education Code section 49414.5 subjects unlicensed school personnel to certain

training standards to provide emergency medical assistance, including administering glucagon, when they do so to students with diabetes under circumstance involving severe hypoglycemia. Ed. Code § 49414.5(a), (b).

Respondents then assert that the fact that "assist" and "administer" are not synonymous supports restricting the authority of unlicensed school personnel to helping with self-administration of medication as opposed to actually administering it. (RB/35-38)

Although respondents are right to assert that "assist" and "administer" are not synonymous, they are wrong to assert that they are unrelated.

As explained, to speak of "administering ... or *otherwise* assisting" means that "assisting" is the *including* term and "administering" is the *included* term—that is, "*assisting* ... in the administration of medication" includes administering medication as well as helping with self-administration.

Respondents claim that " 'assist' and 'administer' are defined under California law." (RB/37) Although they cite some legal definitions for "administer," they offer none for "assist"—and certainly none that precludes "assist" as the including term and "administer" as the included term.

Respondents imply that "otherwise" cannot be used to make "assisting" the including term and "administering" the included term: Such a use, they say, "is illogical and ignores the plain meaning of the term." (RB/38)

Not at all.

In context, "otherwise" means simply "in a different way or manner." Merriam-Webster OnLine, *available at* http://www.merriam-webster.com/dictionary/otherwise (as of Dec. 15, 2009) Thus, "administering ... or *otherwise* assisting" means "administering ... or assisting *in a different way or manner*"—which means that "administering" is simply one *of more than one* way or manner of "assisting." If "administering" and "assisting" carried separate meanings with no overlap, then "otherwise" would be superfluous. The presence of "otherwise" shows that "assisting" is the including term and "administering" the included term.[2]

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[2] Contrary to their complaint that our use of "otherwise" "is illogical and ignores the plain meaning of the term," respondents use the term in the same fashion. (*See* RB/43 ("The licensing requirements of the NPA [i.e., Nursing Practice Act] do not prevent or *otherwise* stand in the way of a free, appropriate public education for pupils with diabetes." (Italics added.))

Respondents also imply that to read "assisting" as the including term and "administering" as the included term would "produce inconsistencies or absurd consequences." (RB/37 n.34)

First, respondents say that such a reading would cause the language of Education Code section 49423 to "make[ ] no sense." (*Id.*) But they do not explain, nor is it apparent, why that would be so. Indeed, a reading of that sort causes the provision's language to mean that unlicensed school personnel as well as the school nurse may administer medication as well as help with self-administration. Although respondents may not like the sense the language makes when read in this fashion, they cannot seriously deny that it does in fact make sense.

Second, respondents say that such a reading would render "assisting" "superfluous" and deprive it of any "real meaning." (*Id.*) Not at all, "assisting" would mean administering as well as helping with self-administration.

Third, respondents say that such a reading would make certain other provisions "unnecessary" [RB/37 n.34]—specifically, (1) Education Code section 49423's authorization for students to self-administer prescription auto-injectable epinephrine [Ed. Code § 49423(a)] and, presumably, Education Code section 49423.1's authorization for them to self-administer inhaled asthma medication [Ed. Code § 49423.1(a)]; and (2) Education Code section 49414.5's imposition of specified training standards on unlicensed school

personnel to provide emergency medical assistance, including administering glucagon, to students with diabetes under circumstances involving severe hypoglycemia [Ed. Code § 49414.5(a), (b)]. (RB/34-35, 37 n.34, 39)

But the authorization for unlicensed school personnel to administer medication as well as help with self-administration would not make "unnecessary" the authorization for students to self-administer prescription auto-injectable epinephrine or inhaled asthma medication. The authority granted to *unlicensed school personnel* does not extend to *students*.

Neither would the authorization for unlicensed school personnel to administer medication as well as help with self-administration make "unnecessary" the imposition of specified training standards on unlicensed school personnel to provide emergency medical assistance, including administering glucagon, to students with diabetes under circumstances involving severe hypoglycemia. The authority granted to unlicensed school personnel does not carry with it the imposition of any specified training standards for acting under any specified circumstances.

Invoking the rule of statutory interpretation *expressio unius est exclusio alterius*, respondents go on to argue that the fact that statutory provisions other than Education Code section 49423 authorize the administration of insulin—with Education Code section 49414.5 authorizing students as young as elementary-school age to

administer insulin to themselves, and Health and Safety Code section 1507.25 authorizing even babysitters to administer insulin to foster children—means that Education Code section 49423 does *not* authorize unlicensed school personnel to administer insulin to students with diabetes. (RB/29-30)

We have anticipated this argument in our opening brief and shown it to be wanting. (AOB/49) Here, we need only state the following.

Expressio unius operates as to a *single* statutory provision. For example, if a single statutory provision authorized the detention and placement of dependent children *within* the United States, the provision would be interpreted under *expressio unius not* to authorize their detention and placement *outside*.

Expressio unius, by contrast, does *not* operate across *two or more* statutory provisions. For example, if one statutory provision authorized the detention and placement of dependent children within the United States *expressly*, another provision might be interpreted without offense to *expressio unius* to authorize their detention and placement outside *by implication*. *See In re Sabrina H.*, 149 Cal.App.4th 1403, 1412 (2007) (so interpreting statutory provisions in the Welf. & Inst. and Family Codes).

Of course, here we do not have a single statutory provision, but three—Education Code section 49414.5, Education Code section 49423, and Health and Safety Code section 1507.25.

Under *expressio unius*, the fact that Education Code section 49414.5 and Health and Safety Code section 1507.25 might authorize the administration of insulin *more or less expressly* [Ed. Code § 49414.5 (authorizing "diabetes self-care"); Health & Saf. Code § 1507.25(b)(1) (authorizing the administration of "insulin")] does *not* mean that Education Code section 49423 does not authorize the administration of insulin *by implication* by authorizing the administration of "medication" generally [Ed. Code § 49423(a)].

Similarly, under *expressio unius*, the fact that Education Code section 49414.5 and Health and Safety Code section 1507.25 might each authorize the administration of insulin *within its own sphere*, that is, self-administration by students and administration to foster children, respectively, does *not* mean that Education Code section 49423 does not *clarify* the authorization of the administration of insulin *within its sphere*, that is, administration to students by unlicensed school personnel as well as the school nurse. The Legislature has frequently enacted bills with an intent to clarify the law, including provisions of the Education Code. *See, e.g.*, West's Ann. Cal. Educ. Code §§ 95, 262.3, 1243, 2557.5, 7000, 8150, 8208, 22000, 22146, 33050, 35160.1, 35292.5, 41204.5, 46140.5, 51769, 52301, 71001, 94021 (Westlaw (as of Dec. 21, 2009)). *Expressio unius* does not stand in the way of such clarification. *See In re J.W.*,

29 Cal.4th 200, 209-13 (2002) (although, under *expressio unius*, Fam. Code § 7895 might appear to restrict the right to appointed appellate counsel, upon termination of parental rights, to parents of juvenile court dependents, the Legislature's clarifying intent, among other things, prohibited such a restriction).

We acknowledge here, as we acknowledged in our opening brief [AOB/30 n.3, 33-34 n.4, 44 n.5], that the CDE had issued documents that might be read to imply that the language of Education Code section 49423 does not authorize unlicensed school personnel to administer insulin to students with diabetes [2AA/483-514; 7AA/1709-10]. But Education Code section 49423's language says what it says. The CDE's understanding of that language cannot change its meaning or set up any kind of estoppel. For the determination of Education Code section 49423's meaning is solely and finally a "judicial function." *McClung v. Employment Development Dept.*, 34 Cal.4th 467, 470 (2004).

b. The Legislative History Supports An Interpretation Of Education Code Section 49423 That Authorizes Unlicensed School Personnel To Administer Insulin To Students With Diabetes

In our opening brief, we next demonstrated that the legislative history of Education Code section 49423 supports interpreting the provision as authorizing unlicensed school personnel to administer insulin to students with diabetes. (AOB/31-34)

Respondents limit their response to the message by Governor Davis accompanying his veto of Assembly Bill No. 481 (2001-02 Reg. Sess.), which would have added a statutory provision *requiring* that unlicensed school personnel "*shall* administer assistance"—including the "administration of ... insulin"—to students with diabetes [Assem. Bill No. 481 (2001-02 Reg. Sess.) as enrolled Sept. 17, 2002, § 2, at 3-4 (italics added)]. (RB/21-22)

Respondents ignore the portion of the veto message noting that Education Code section 49423 "already provides that any pupil who is required to take prescription medication ... may be assisted by school personnel." Governor's Veto Message to Assem. on Assem. Bill No. 481 (2001-02 Reg. Sess.) (Sept. 26, 2002). This portion of the veto message reflects an understanding that Education Code section 49423 *already authorized* what Assembly Bill No. 481 *would have mandated*—that unlicensed school personnel may "assist" students with diabetes with medication, including administering insulin to them. That understanding is relevant to the proper interpretation of Education Code section 49423. Respondents, however, pass over it in silence.

Instead, respondents say that our reading of the Governor's veto message "does not pass muster." (RB/22) They seem to imply that "assist" supports their position. Hardly. "Assist" includes "administer." The Governor did not veto Assembly Bill No. 481 because he believed that unlicensed school personnel should not be

authorized to administer insulin to students with diabetes, but solely because he determined that they should not be required to do so.

c. A Consideration Of Practical Consequences Confirms That Education Code Section 49423 Authorizes Unlicensed School Personnel To Administer Insulin To Students With Diabetes

In our opening brief, we then demonstrated that a consideration of practical consequences of alternative readings of Education Code section 49423 confirms interpreting the provision as authorizing unlicensed school personnel to administer insulin to students with diabetes. (AOB/34-35)

On this point, respondents have nothing at all to say. Specifically, they do not deny that our reading of Education Code section 49423 would authorize unlicensed school personnel to perform the simpler task—delivering a dose of insulin—as well as the harder one—assessing what dose should be delivered. (3AA/721) Neither do they deny that *their* reading would stand things on their head, authorizing unlicensed school personnel to perform only the harder task but not the simpler one. Their silence in this regard speaks concession. How could it be otherwise? Translated outside the context of insulin, their reading would authorize unlicensed school personnel to measure out cough syrup or eye drops, but prohibit them from putting the syrup into the student's mouth or the drops into the student's eye—an absurd result. Respondents' attempt to persuade

this Court to ignore the practical consequences of such an interpretation in favor of empty formalism should be rejected.

* * *

In conclusion, respondents fail to refute our showing that the Education Code section 49423 authorizes unlicensed school personnel to administer insulin to students with diabetes.

3. Business and Professions Code Section 2725 Does Not Prohibit Unlicensed School Personnel From Administering Insulin To Students With Diabetes

In our opening brief, we showed that the Nursing Practice Act in general and Business and Professions Code section 2725 in particular do not require registered nurses to administer insulin, nor do they prohibit persons who are not registered nurses from doing so—meaning, as pertinent here, that they do not make the administration of insulin the exclusive domain of registered nurses and thereby prohibit unlicensed school personnel from administering insulin to students with diabetes. (AOB/36-41)

We made that showing by making the following points—none of which, as will appear, respondents have succeeded in refuting.

First, and at the threshold, we demonstrated that neither Business and Professions Code section 2725 specifically nor the Nursing Practice Act generally addresses the administration of insulin,

whether *by* unlicensed school personnel or *to* students with diabetes, or otherwise. (AOB/36-41, 46-49)

Respondents are silent on this point and must be deemed to concede it.

Second, we demonstrated that, even though the Nursing Practice Act provides that only a registered nurse may engage in the practice of registered nursing, which comprises the performance under Business and Professions Code section 2725 of certain functions, including the "administration of medications," that "require a substantial amount of scientific knowledge or technical skill" [Bus. & Prof. Code § 2725(b)(2)], the administration of *insulin* does not require a substantial amount of scientific knowledge or technical skill. (AOB/36-38)

Against this point, respondents argue that under the Nursing Practice Act, only a registered nurse may administer medications, whether or not the administration of the medication in question requires a substantial amount of scientific knowledge or technical skill. (RB/24-25) According to respondents, the inclusion of "administration of medications" in Business and Professions Code section 2725 forecloses any inquiry into whether a substantial amount of scientific knowledge or technical skill is actually required to administer *any* medication, whether insulin ... or aspirin.

Respondents' argument, however, has already been rejected in an opinion of the Attorney General that respondents otherwise embrace. (RB/37) There, the Attorney General concluded that the Nursing Practice Act "does not prohibit" a person other than a registered nurse "from the administration of drugs ... in ways which do not require substantial scientific knowledge or technical skill." 71 Ops. Cal. Atty. Gen. 190, ___ [1988 WL 385204, at *8] (1988).[3]

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[3] We note that, in *State ex rel. Lancaster School Dist. Support Assn. v. Bd. of Edn. Lancaster City School Dist.*, No. 03 CVH 02 1443 (Ohio Ct. of Common Pleas Mar. 6, 2006), *appeal dismissed for mootness*, 2006 WL 3008475 (Ohio App. 10th Dist.), the court concluded that Ohio's Nurse Practices Act [Ohio R.C. 4723], which is similar to California's Nursing Practice Act, does *not* prohibit a person other than a registered nurse from "administering medicine" that does not "require[ ] 'specialized knowledge, judgment, and skill derived from the principles of biological, physical, behavioral, social, and nursing sciences.' " (Slip op. at 10) (The trial court decision in *State ex rel. Lancaster School Dist. Support Assn.* is the subject of a contemporaneously-filed motion for judicial notice. The appellate court decision is attached as Exhibit A. *See* Cal. R. Ct. 8.1115(c).)

As we acknowledged in our opening brief [AOB/38 n.5], in the opinion cited in the text the Attorney General concluded that all "injections by hypodermic syringe"—including subcutaneous injections, one mechanism for administering insulin to persons with diabetes—"require[d] a substantial amount of scientific knowledge or technical skill." 71 Ops. Cal. Atty. Gen. at ___ [1988 WL 385204, at *8]. That conclusion was based on section 409.33 of title 42 of the Code of Federal Regulations, which at the time included the administration of all injections as a "skilled nursing service[ ]" for purposes of payment under the Medicare Program. 48 Fed. Reg. 12526, 12545 (Mar. 25, 1983). The conclusion, however, lost any vitality it might ever have had ten years later when section 409.33 was

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In any event, respondents' argument fails on its own terms. The argument would mandate the administration of *all* medications by registered nurses and bar the administration of *any* medication by anyone else. It would also presuppose that the Legislature had made a factual determination, sub silentio, that the administration of each and every medication required a substantial amount of scientific knowledge or technical skill—a presupposition that would be absurd and should accordingly be avoided. Cf. *Santa Clara Co. Local Transp. Auth. v. Guardino*, 11 Cal.4th 220, 235 (1995) (absurd consequences should be avoided). It is much more sensible to conclude that the Legislature has defined the "administration of medications" as a function within the practice of registered nursing *when in fact it requires a substantial amount of scientific knowledge or technical skill.*

By way of fall-back, respondents argue that the administration of insulin, at least, requires a substantial amount of scientific knowledge or technical skill. (RB/5)

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revised to exclude the administration of injections. *See* 63 Fed. Reg. 26252, 26284, 26307 (May 12, 1998). That is especially true as to subcutaneous *insulin* injections. Section 409.33 was revised because the administration of subcutaneous injections generally could no longer be deemed a "skilled nursing service." 63 Fed. Reg. at 26284. "[W]ith the evolving state of clinical practice over time, the administration of a subcutaneous injection has now become commonly accepted as a nonskilled service[.]" *Id.* Indeed, "the most frequently administered type of subcutaneous medication is insulin, which has long been defined as a nonskilled service[.]" *Id.*

The fact that the administration of insulin does *not* require a substantial amount of scientific knowledge or technical skill is suggested as a matter of law by Health and Safety Code section 1507.25, in which the Legislature has authorized even babysitters to administer insulin to foster children, and by Education Code section 49414.5, in which it has authorized students as young as elementary-school age to administer insulin to themselves.[4]

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[4] In our opening brief, we noted that the Vocational Nursing Practice Act [Bus. & Prof. Code § 2840 et seq.] supports the conclusion that the administration of insulin does not require a substantial amount of scientific knowledge or technical skill. (AOB/38) Although the Vocational Nursing Practice Act does *not* require licensed vocational nurses to have a substantial amount of scientific knowledge or technical skill—it requires only "technical, manual skills" of them [Bus. & Prof. Code § 2859]—it nevertheless authorizes them to "[a]dminister medications by hypodermic injection," which includes insulin. Bus. & Prof. Code § 2860.5(a).

Respondents attempt to quibble themselves out of the language of the Vocational Nursing Practice Act, but fail in their effort. (RB/31) The administration of insulin requires no more than "technical, manual skill[ ]" [Bus. & Prof. Code § 2859]—which the evidence shows without dispute can be, and routinely has been, taught to unlicensed persons, including school personnel. (4AA/844; 6AA/1647-52, 1667-68)

Contrary to respondents' implication [RB/31-32], it is *not* the case that, whereas licensed vocational nurses may administer medication by hypodermic injection only "when directed by a physician and surgeon" [Bus. & Prof. Code § 2860.5], unlicensed school personnel are free to do so on their own. Quite the opposite: Unlicensed school personnel may administer medication by hypodermic injection only in accordance with a "written statement

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In addition, and dispositively, the fact that the administration of insulin does not require a substantial amount of scientific knowledge or technical skill is established as a matter of fact by the undisputed evidence presented in the trial court.

- In California public schools, as noted, insulin is administered to students with diabetes in accordance with the detailed orders of his or her physician. Ed. Code § 49423(b)(1).

- As Dr. Kaufman and Dr. Siminerio testified—consistently with the position of the American Academy of Pediatrics, American Association of Clinical Endocrinologists, Pediatric Endocrine Nursing Society, American Association of Diabetes Educators, and Juvenile Diabetes Research Foundation [6AA/1652]—the actual administration of insulin involves two tasks: assessing the correct dose and then delivering that dose. (3AA/721)

- Assessing the correct dose does not require a substantial amount of scientific knowledge or technical skill, only

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from the [student's] physician detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken." Ed. Code § 49423(a), (b)(1).

following the physician's detailed orders. (3AA/721-22; 6AA/1647-48, 1649-50)

- Neither does giving the correct dose require a substantial amount of scientific knowledge or technical skill, only the manipulation of a hypodermic syringe, insulin pen, or insulin pump, which is within the capacity of some elementary-school-aged children. (3AA/722; 6AA/1648-49)

- Unlicensed persons—including unlicensed school personnel—can be trained, and routinely have been trained, to administer insulin safely. (4AA/844; 6AA/1647-52, 1667-68)

- Dr. Kaufman testified that unlicensed persons "can be and routinely are trained to administer diabetes medications, including insulin." (3AA/720) And Dr. Siminerio testified that she had, in fact, "successfully—and routinely—taught all of [the] tasks" necessary for safe administration of insulin to "people of all education

backgrounds," including persons "with severe mental challenges," and "even to children." (6AA/1648)[5]

Third, we demonstrated that the Nursing Practice Act provides that only a registered nurse may engage in the practice of registered nursing *as a professional registered nurse*, that is, in rendering personal services to the general public as a means of livelihood; it does *not* provide that only a registered nurse may perform functions such as the administration of medications. (AOB/36, 38-39)

Against this point, respondents set out to knock down a straw man they themselves have erected: "Contrary to" our supposedly "unsupported argument," the scope of the Nursing Practice Act "is not limited to registered nurses who charge for their services." (RB/26)[6] We did not, however, present any such argument. Instead, we argued

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[5] Returning to *State ex rel. Lancaster School Dist. Support Assn.* [*see, ante*, at 36 n.3], we note that there, the court found that the administration of Diastat, a medication inserted rectally into a seizing child to abruptly stop the seizure, "does not require the type of nursing judgment contemplated under the Nurse Practices Act ...." (Slip op. at 11) Such a finding would apply a fortiori to the administration of insulin, which does not entail such insertion under such circumstances.

[6] Prior to 1974, Business and Professions Code section 2725 defined a "registered nurse" as a person "who for compensation or personal profit engages in nursing." Stats. 1968, ch. 348, § 1. In 1974, Business and Professions Code section 2725 was amended to remove that definition and to leave "registered nurse" undefined. Stats. 1974, ch. 355, § 1; Stats. 1974, ch. 913, § 1.

that the Nursing Practice Act purports to regulate "professional nursing" by registered nurses—whether or not they charge for their services; it does not grant them any monopoly over any particular function they happen to perform, including the administration of any medication under Business and Professions Code section 2725. (AOB/39) This argument is no more problematical than one that would run as follows: "The State Bar Act, set out in Business and Professions Code section 6000 et seq., purports to regulate the practice of law by attorneys, whether or not they charge for their services; it does not grant them any monopoly over any particular function they happen to perform, including collection of debts under Business and Professions Code section 6077.5."[7]

Fourth, we demonstrated that, even if the Nursing Practice Act provided that only a registered nurse could perform functions such as the administration of medications, it contains three express exceptions

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[7] In our opening brief, we noted that the Vocational Nursing Practice Act supports the conclusion that the Nursing Practice Act does *not* provide that only a registered nurse may perform functions such as the administration of medications, including particularly the administration of "medications," such as insulin, "by hypodermic injection" [Bus. & Prof. Code § 2860.5(a)]. (AOB/47) Respondents cannot rob this point of its force merely by asserting that the Nursing Practice Act "does not authorize unlicensed *school personnel* to administer insulin to students." (RB/31 (italics in original)) It has never been our position that *the Nursing Practice Act* grants authority to unlicensed school personnel—that is what Education Code section 49423 does.

in Business and Professions Code section 2727 that are each broad enough to lift any otherwise-applicable prohibition against unlicensed school personnel administering insulin to students with diabetes. (AOB/39-41)

Specifically, Business and Professions Code section 2727 "does not prohibit" the "[g]ratuitous nursing of the sick by friends ... of the family." Bus. & Prof. Code § 2727(a). This exception is broad enough to cover the administration of insulin to students with diabetes by unlicensed school personnel. Such personnel provide "gratuitous nursing" *both* because they are not under any obligation to administer insulin *and also* because they are not paid anything additional for doing so. In addition, they may be deemed "friends of the family" because they may be chosen with the consent of the student's parent, foster parent, or guardian and, in any event, act as a "friend" to the student in his or her need. (AOB/40) The concept of "friendship" is broad. Had the Legislature intended to restrict the scope of this exception, it would surely have used some notion narrower than "friendship." Because it did not use any narrower notion, it evidently did not intend any restriction.

As to this exception, respondents argue that unlicensed school personnel who administer insulin to students with diabetes do not provide "gratuitous nursing" because they offer such services "in the course and scope of employment for which they are compensated," and may not be deemed "friends of the family" because they "may

have no relationship" with the student's parent, foster parent, or guardian "outside the school setting." (RB/28)

This exception, however, requires only that the "nursing" that any person provides must be "gratuitous," not that the person otherwise work for free. Likewise, the exception requires only that any person who provides "gratuitous nursing" must be deemed a "friend of the family," not that the person must have some relationship outside the sphere in which he or she provides the services.

In addition, Business and Professions Code section 2727 "does not prohibit" "[n]ursing services in case of an emergency," which "includes an epidemic or public disaster." Bus. & Prof. Code § 2727(d). This exception is broad enough to cover the administration of insulin to students with diabetes by unlicensed school personnel, given the severe nursing shortage and even more severe consequences that can result if the administration of insulin is delayed or denied. (6AA/1505)

As to this exception, respondents argue that Business and Professions Code section 2727 "defines 'emergency' as 'an epidemic or public disaster,' " and on that basis argue that any broader reading "can hardly be taken seriously." (RB/27) The argument is at best disingenuous. Business and Professions Code section 2727 does not define "emergency" *as* "an epidemic or public disaster," but to "*include*[ ] an epidemic or public disaster." Bus. & Prof. Code § 2727(d) (italics added).

Likewise, Business and Professions Code section 2727 "does not prohibit" performing "such duties as required in ... carrying out medical orders prescribed by a licensed physician; provided, such person shall not in any way assume to practice as a professional, registered, graduate or trained nurse." Bus. & Prof. Code § 2727(e). This exception is broad enough to cover the administration of insulin to students with diabetes by unlicensed school personnel. Such personnel must act in accordance with a "written statement from the [student's] physician detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken." Ed. Code § 49423(a), (b)(1). Of course, in doing so, they do not assume to practice as any kind of nurse.

As to this exception, respondents are silent and must be deemed to concede its applicability.

In conclusion, respondents fail to refute our showing that the Nursing Practice Act in general and Business and Professions Code section 2725 in particular do not prohibit unlicensed school personnel from administering insulin to students with diabetes.[8]

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[8] Respondents argue that neither Education Code section 49414.5, which authorizes students as young as elementary-school age to administer insulin to themselves, nor Health and Safety Code section 1507.25, which authorizes even babysitters to administer insulin to foster children, is broad enough to cover the administration of insulin to students with diabetes by unlicensed school personnel.

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4. In Any Event, Federal Anti-Discrimination Law Would Require Education Code Section 49423 And Business and Professions Code Section 2725 To Be Interpreted To Authorize, And Not To Prohibit, Unlicensed School Personnel To Administer Insulin To Students With Diabetes

In our opening brief, we showed that, even if there were any doubt whether Education Code section 49423 and Business and Professions Code section 2725 were consistent, Education Code section 49423 would have to be interpreted to authorize unlicensed school personnel to administer insulin to students with diabetes, and Business and Professions Code section 2725 would have to be interpreted not to prohibit them from doing so, in order to avoid serious constitutional questions. (AOB/41-44)

It is black letter law that, under the Supremacy Clause of Article VI of the United States Constitution, state law is unconstitutional and hence invalid to the extent that it is preempted by federal law.

In their argument, respondents attempt both to alter the doctrine of preemption and also to avoid its force by practically denying the existence of Section 504, the Americans with Disabilities Act, and the IDEA. (RB/40-46)

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(RB/27-28, 28-29) *Why* respondents so argue is not apparent. We have never claimed otherwise.

Contrary to respondents' implication, Section 504, the Americans with Disabilities Act, and the IDEA do indeed grant students with diabetes a right to a free appropriate public education with an enabling right of access to the administration of insulin, and do not offer them merely whatever "accommodation" a school district might happen to deem "reasonable." We have already dispatched respondents' argument in this regard, and need not revisit that argument or the decisions cited in support. *See*, *ante*, at 13-16.

Contrary to respondents' further implication, federal law preempts state law not only when "compliance with both ... is impossible"—impossibility preemption—but also when state law simply "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as embodied in federal law—frustration-of-purpose preemption. *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 955 (2004); *accord*, *e.g.*, *Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1152 (9th Cir. 2000).

Respondents' attempt to rewrite the preemption doctrine and to eviscerate the rights of students with diabetes under Section 504, the Americans with Disabilities Act, and the IDEA should be rejected.

We have established that many students with diabetes must take insulin at several times, unscheduled as well as scheduled, throughout the day in order to survive. In the face of the severe nursing shortage in this state, the failure of California law to provide for the administration of insulin would put these students at substantial risk of

physical harm and would be tantamount to shutting the school house door against them, in clear violation of Section 504, the Americans with Disabilities Act, and the IDEA. Yet, respondents argue that receiving insulin during the school day is only a qualified right—effectively, no right at all. (RB/40-46) They are wrong.

Respondents take the view that California law need only provide for the administration of insulin to students with diabetes to the extent it must make a "reasonable accommodation," and that it meets this standard by authorizing the seven categories of persons listed in the Legal Advisory as explicitly permitted to administer insulin. They contend that, if the only way that a child can receive necessary insulin is for parents to come to school several times a day every day ... well, so be it. In practice, students who find themselves in this vulnerable position would risk their health, or their parents' economic well-being, every time they go to school.

Hardly. The proper inquiry in this case is whether California law would adequately ensure that students with diabetes had access to the administration of insulin as required by Section 504, the Americans with Disabilities Act, and the IDEA if it authorized only the seven categories of persons listed in the Legal Advisory—excluding the eighth, covering unlicensed school personnel—as explicitly permitted to administer insulin to such students.

We have shown that the answer is, "No." As an initial matter, only three categories are actually relevant to this inquiry. The first

category—self-administration—is not an option for the students at issue in this case. The fifth and sixth categories—parents or guardians and persons who are designated by parents or guardians and are not school employees—are irrelevant, because it is the school district, not parents or guardians, that is required to provide related services. The seventh category—unlicensed school personnel—is limited to services provided in "emergencies"—which, as respondents define "emergencies," would not include routine administration of insulin. That leaves only the second, third, and fourth categories—including school nurses, licensed school personnel, and licensed contractors. Such persons, however, are not always available. (3AA/794-95) If a school district were to find itself unable to provide for the administration of insulin to students with diabetes who need insulin because school nurses or other licensed school personnel or contractors were not available, then the rights of such students under Section 504, the Americans with Disabilities Act, and the IDEA would be violated.

Respondents' argument that Section 504, the Americans with Disabilities Act, and the IDEA would not preempt Education Code section 49423 and Business and Professions Code section 2725 if they were interpreted to prohibit unlicensed school personnel from administering insulin to students with diabetes ignores this crucial point: Federal law preempts state law whenever state law frustrates the purpose of federal law, and not only when compliance with both federal law and state law is impossible.

Together with their misguided preemption analysis, respondents assert that it would not be impossible, in all cases, to comply with *both* Section 504, the Americans with Disabilities Act, and the IDEA *and* Education Code section 49423 and Business and Professions Code section 2725, even if the latter were interpreted to prohibit unlicensed school personnel from administering insulin to students with diabetes.

By its own terms, however, the Legal Advisory states that unlicensed school personnel must be available to administer insulin to students with diabetes to enable them to exercise their right to a free appropriate public education under Section 504, the Americans with Disabilities Act, and the IDEA *only when* no other person authorized under state law is available to do so. If other authorized persons prove to be available, unlicensed school personnel need not be. But if other authorized persons prove not to be available, unlicensed school personnel must be in order to ensure compliance with federal anti-discrimination law.[9]

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[9] None of the decisions respondents cite compels a different conclusion. Several decisions concern themselves with whether state law is preempted by federal law expressly, *not* by frustrating its purpose. *See Comm. of Dental Amalgam Mfrs. & Distributors v. Stratton*, 92 F.3d 807 (9th Cir. 1996); *Ginochio v. Surgikos, Inc.*, 864 F.Supp. 948 (N.D. Cal. 1994); *Bravman v. Baxter Healthcare Corp.*, 842 F.Supp. 747 (S.D.N.Y. 1994). Another decision addresses whether state law is preempted because it authorizes what federal law prohibits, *not* because it frustrates its purpose. *See Sanders v.*

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Respondents' attempt to distinguish *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), is unavailing.

Crowder, it will be recalled, involved a Hawaii statute and implementing regulation that imposed a 120-day quarantine for all carnivorous animals entering the state. Those provisions denied visually-impaired individuals guide dog services needed for mobility and safety, in violation of their right of access to state services, programs, and activities granted by the Americans with Disabilities Act. *Id.* at 1485. Since it was "incumbent upon the courts to insure

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Lockyer, 365 F. Supp.2d 1093 (N.D. Cal. 2005). Other decisions conclude that state law materially different from Education Code section 49423 and Business and Professions Code section 2725 did not frustrate the purpose of federal law materially different from Section 504, the Americans with Disabilities Act, and the IDEA. *See Bronco Wine Co. v. Jolly*, 33 Cal.4th 943 (federal and state wine labeling law); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007) (federal and state arbitration law); *Williamson v. General Dynamics Corp.*, 208 F.3d 1144 (federal labor law and state fraud law); *Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941 (9th Cir. 1992) (federal hazardous substance law and state warning law); *Chamberlan v. Ford Motor Co.*, 314 F.Supp.2d 953 (N.D. Cal. 2004) (federal motor safety law and state unfair competition law); *Kent v. DaimlerChrysler Corp.*, 200 F.Supp.2d 1208 (N.D. Cal. 2002) (federal motor vehicle safety law and state consumer protection law); *but see International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (state nuisance law would frustrate the purpose of federal clean water law). The remaining decision does not refer to preemption at all. *See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163 (1999).

that the mandate of federal law is achieved," the quarantine could not stand as to guide dogs of visually-impaired individuals. *Id.* at 1485-86.

Here, as in *Crowder*, if California law prohibited unlicensed school personnel from administering insulin to students with diabetes, it could not stand under Section 504, the Americans with Disabilities Act, and the IDEA because there are not, and will not be, enough licensed personnel to do so.

Respondents suggest that the problem with the quarantine as to guide dogs of visually-impaired individuals at issue in *Crowder* was that it lacked the kind of "reasonable accommodations" that they claim are available to students with diabetes under their reading of California law. Not so.

As demonstrated, here students with diabetes are denied meaningful access to a free appropriate public education because they cannot attend school safely without someone there to administer insulin, just as visually-impaired individuals in *Crowder* were denied meaningful access to state services, programs, and activities because they could not travel safely without their guide dogs.

Moreover, in *Crowder* the state quarantine statute and regulation had to give way as to guide dogs of visually-impaired individuals before the mandate of the Americans with Disabilities Act despite the fact that compliance with both state and federal law was

technically possible in some cases. After all, some visually-impaired individuals, either on their own or with the help of others, might have been able to engage in state services, programs, and activities without their guide dogs, just as some students with diabetes might be able to receive insulin from someone other than unlicensed school personnel. *Crowder* makes clear, however, that courts must look to whether state law would frustrate the purpose of federal law *as a practical matter.* If it would, it must give way.

It may well be, as respondents claim, that Section 504, the Americans with Disabilities Act, and the IDEA do "not prohibit states from establishing qualifications" for the administration of insulin. (RB/45 (underscoring omitted)) But it *does* prohibit them from denying students with diabetes the right to a free appropriate public education, and the enabling right of access to the administration of insulin, by establishing a system of qualifications so restrictive as to frustrate the purpose of federal law.

In conclusion, respondents fail to refute our showing that Education Code section 49423 and Business and Professions Code section 2725 would have to be interpreted to authorize, and not to prohibit, unlicensed school personnel to administer insulin to students with diabetes in order to avoid serious constitutional questions of preemption.

5. The Legal Advisory Is Consistent With Education Code Section 49423, And Not Inconsistent With Business and Professions Code Section 2725, In Recognizing The Authority Of Unlicensed School Personnel To Administer Insulin To Students With Diabetes

In our opening brief, we showed that, in stating that unlicensed school personnel are authorized to administer insulin to students with diabetes, the Legal Advisory is consistent with Education Code section 49423 and is not inconsistent with Business and Professions Code section 2725, and that the trial court erred in declaring it invalid to that extent. (AOB/44-50)

On this point, respondents do not make any argument that has not already been dispatched, and as a result do not refute our showing.

C. Contrary To Respondents' Claim, The Legal Advisory Is Not Subject To Or Non-Compliant With The APA, And In Any Event Would Not Require Invalidation

Respondents attempt to save the second of the trial court's two conclusions underlying its judgment—that to the extent it states that unlicensed school personnel are authorized to administer insulin to students with diabetes, the Legal Advisory is invalid because it constitutes an APA "regulation" not adopted in compliance with the APA's procedural requirements. They prove unsuccessful here too.

1. The Legal Advisory Is Not A "Regulation" Within The Meaning Of The APA

In our opening brief, we demonstrated that the Legal Advisory is not a "regulation" within the meaning of the APA because, under *Excelsior College v. California Bd. of Registered Nursing*, 136 Cal.App.4th 1218 (2006), it is merely a statement by the CDE of its understanding of the law and its intent to comply. (AOB/53)

Respondents argue that this is not so, because in issuing the Legal Advisory, the CDE was "not attempting to enforce its own statute or regulation." (RB/16) But neither *Excelsior College*, which they cite, nor any other reported decision of which we are aware, imposes any "own-statute-or-regulation" limitation. In any event, as the face of the Advisory discloses, the CDE was attempting to enforce, among other statutes and regulations, Education Code section 49423 and *its* implementing regulations. (1AA/215-27)[10]

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[10] Respondents imply that the Legal Advisory is a "regulation" within the meaning of the APA simply because it is "mandatory." (RB/12 (underscoring omitted)) Respondents supply no authority for the proposition that any "mandatory" character of the Advisory would render it a "regulation" without more, and we have found none. In any case, the Advisory itself is not "mandatory." What *is* "mandatory" is the law the Advisory states.

On a related point, we note that, in asserting, "[p]rior to enacting [*sic*] the Legal Advisory, the CDE expressly *forbade* unlicensed school staff from administering medications ... by injection" [RB/4 (italics added)], respondents erroneously ascribe to

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2. Even If It Were A "Regulation" Within The Meaning Of The APA, The Legal Advisory Would Not Be Subject To The APA's Procedural Requirements

In our opening brief, we next demonstrated that, even if the Legal Advisory were a "regulation" within the meaning of the APA, it would not have been subject to the APA's procedural requirements because it "embodies the only tenable interpretation" of Education Code section 49423 and Business and Professions Code section 2725 and is therefore exempt [Gov't Code § 11340.9(f)]. (AOB/53-54)

Respondents argue that this too is not so. (RB/19-21) They assert that the existence of a dispute about the proper interpretation of Education Code section 49423 and Business and Professions Code 2725 precludes the existence of a single tenable interpretation. That is not the case. *Cf. MacKinnon v. Truck Ins. Exchange*, 31 Cal.4th 635, 647 (2003) (nationwide dispute about the proper interpretation of a provision in the standard commercial general liability insurance policy does not show that the provision is reasonably susceptible to more than one interpretation).[11]

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the CDE power that is actually possessed by school districts. *See* Ed. Code §§ 35160, 35160.1.

[11] Respondents argue that the Legal Advisory is not a "regulation" exempted from the APA's procedural requirements as "aris[ing] in the course of case-specific adjudication" under *Tidewater Marine*

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3. Even If It Were A "Regulation" Within The Meaning Of The APA And Were Subject To The APA's Procedural Requirements, The Legal Advisory Would Not Require Invalidation

In our opening brief, we then demonstrated that, even if the Legal Advisory were a "regulation" within the meaning of the APA, and even if it had been subject to the APA's procedural requirements, it would not require invalidation inasmuch as the interpretation of Education Code section 49423 and Business and Professions Code section 2725 that it embodies, even if not the only tenable reading, is nevertheless a substantively correct one. (AOB/54-56)

Again, respondents argue that this is not so. (RB/21-23) The argument is based fundamentally on the premise that the interpretation of Education Code section 49423 and Business and Professions Code section 2725 embodied in the Legal Advisory is incorrect. The argument fails because, as we have shown, its premise is unsound.

If this Court interprets Education Code section 49423 and Business and Professions Code section 2725, as we have argued, to authorize, and not to prohibit, unlicensed school personnel to administer insulin to students with diabetes, it would be an idle act—and one ill serving the need to converse scare public resources during

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Western, Inc. v. Bradshaw, 14 Cal.4th 557, 571 (1996). (RB/17-19) We made no such claim, however, in our opening brief.

the unprecedented fiscal crisis now gripping the state and its public schools—to invalidate the Legal Advisory so as to compel the CDE to conduct rulemaking proceedings in order to issue a substantially similar statement again. Since the purpose of such proceedings is to provide affect parties an opportunity to contribute to the formulation of a proposed regulation, "there would be no point" to such proceedings where, as here, "nothing could come of" them. *Capen v. Shewry*, 155 Cal. App. 4th 378, 390 n.7 (2007)[12]

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[12] In our opening brief, we showed that, contrary to respondents' claim, in issuing the Legal Advisory (1) the CDE did not violate section 3.5 of article III of the California Constitution, and (2) the CDE and the Superintendent did not violate Education Code section 33031 and Government Code section 11152, respectively. (AOB/57 n.8) Respondents do not challenge the first point, but do challenge the second. (RB/48) They do so unsuccessfully. Because, as explained in the text, the Advisory is not inconsistent with Business and Professions Code section 2725—the predicate for the alleged Education Code section 33031 and Government Code section 11152 violations—neither the CDE nor the Superintendent committed any violation.

III. CONCLUSION

For the reasons stated above, and for those stated in our opening brief, this Court should reverse the judgment of the trial court, vacate its peremptory writ of mandate, and direct it to deny respondents' petition and enter judgment for appellants.

DATED: December 23, 2009.

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.

REED SMITH LLP

By Dennis Peter Maio
Dennis Peter Maio

Attorneys for Intervener and Appellant American Diabetes Association

WORD COUNT CERTIFICATE

This Appellant's Reply Brief contains 12,775 words (including footnotes, but excluding tables and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on December 23, 2009, at San Francisco, California.

Dennis Peter Maio

EXHIBIT A

Not Reported in N.E.2d, 2006 WL 3008475 (Ohio App. 10 Dist.), 2006 -Ohio- 5520
(Cite as: 2006 WL 3008475 (Ohio App. 10 Dist.))

H

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.
STATE ex rel. LANCASTER SCHOOL DISTRICT SUPPORT ASSOCIATION, OEA/NEA et al., Plaintiffs-Appellants, [Cross-Appellees],
v.
BOARD OF EDUCATION, LANCASTER CITY SCHOOL DISTRICT et al., Defendants-Appellees, [Cross-Appellants].
No. 06AP-305.

Decided Oct. 24, 2006.

Appeal from the Franklin County Court of Common Pleas.
Cloppert, Latanick, Sauter & Washburn, David G. Latanick, Erika Pearsol-Christie, and Rory Callahan, for Lancaster School District Support Association and Jennifer Lape.

Bricker & Eckler, Kimberly J. Brown, Nicholas A. Pittner, Sue W. Yount, and Jennifer A. Flint, for Lancaster City School District Board of Education.

Jim Petro, Attorney General, and Lawrence D. Pratt and Katherine Bockbrader, for Ohio Board of Nursing.

Reminger & Reminger Co., L.P.A., and Paul-Michael La Fayette, for Amicus Curiae Epilepsy Foundation and the Epilepsy Foundation of Central Ohio.

KLATT, P.J.

*1 {¶ 1} Plaintiffs-appellants, the Lancaster School Support Association, OEA/NEA ("LSSA"), Jennifer Lape, and Pamela Orshoski, appeal from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, the Lancaster City School District Board of Education ("School Board") and the Ohio Board of Nursing ("OBN"). Because this case is moot, we dismiss the appeal.

{¶ 2} In the fall of 2002, Student Doe [FN1] entered kindergarten at an elementary school in the Lancaster City School District ("District"). Student Doe suffers from Angelman's Syndrome and, as a result, he is prone to generalized seizures. As part of Student Doe's treatment, his physician prescribed Diastat, a rectally-administered drug that is designed to terminate an ongoing seizure. When Student Doe began attending kindergarten, his mother insisted that school personnel be trained to administer Diastat in the event that Student Doe suffered a seizure in the school bus or at school.

FN1. Throughout the course of this litigation, the parties have preserved Student Doe's privacy by refraining from naming him in any public documents. We will do the same.

{¶ 3} After conferring with Student Doe's physician, school personnel incorporated the administration of Diastat into Student Doe's Individualized Education Program. With the physician's guidance, school personnel developed a protocol for administering the drug if Student Doe began seizing in the school bus or at school. The protocol only authorized certain individuals to administer Diastat to Student Doe. Lape and Orshoski, educational aides who interfaced with Student Doe during the school day, were included in the list of authorized individuals. Neither Lape nor Orshoski is a licensed nurse. Nevertheless, Lape and Orshoski's supervisor required them to administer Diastat to Student Doe in the event of a seizure.

{¶ 4} On February 6, 2003, appellants filed suit against the School Board and the OBN. Appellants acknowledged in their verified complaint that school personnel implemented the protocol in accordance with the established School Board policy for the administration of drugs to students, which was adopted pursuant to and in compliance with R.C. 3313.713. However, appellants contended that the administration of Diastat constituted the unauthorized practice of nursing under the Nurse Practice Act, R.C. Chapter 4723, and its accompanying regulations.

{¶ 5} In the appellants' amended complaint, Lape and Orshoski sought a temporary restraining order and preliminary and permanent injunctions prohibiting the School Board from requiring them to administer Diastat. Additionally, all appellants sought a writ of mandamus that would require the OBN to enforce its prohibition against the unauthorized practice of nursing. Finally, all appellants sought a declaratory judgment stating that: (1) the protocol requiring unlicensed District employees to perform nursing functions violated R.C. 4723.02; (2) R.C. 3313.713 did not grant the School Board the authority to require its employees to engage in the unauthorized practice of nursing; and, (3) the School Board violated Lape and Orshoski's rights by requiring them to engage in the unauthorized practice of nursing and thereby subjecting them to civil and criminal liability.

*2 {¶ 6} All the parties filed motions for summary judgment. While these motions remained pending, Student Doe's parents enrolled him in a school outside of the purview of the District. Student Doe, now in the fourth grade, continues to attend this non-district school.

{¶ 7} On March 7, 2006, the trial court issued a decision and entry granting the School Board and the OBN's motions for summary judgment. Appellants now appeal from that judgment. The School Board and the OBN have filed cross-appeals.

{¶ 8} On appeal, appellants assign the following errors:

1. The lower court erred in failing to hold that the administration of medications to enrolled students at a public school district is governed by Ohio's Nurse Practice Act and must be handled by a registered nurse, licensed practical nurse, or a non-nurse acting pursuant to a delegation of nursing authority.

2. The lower court erred in holding that a non-nurse in a public school setting may assess the medical condition of a student experiencing absence seizures, complex partial seizures and/or tonic-clonic seizures for the purpose of making decisions on whether or not to administer medications.

3. The lower court erred in holding that the "emergency" exception, R.C. 4723.32(D), to the otherwise broad prohibition of the unauthorized practice of nursing in the Nurse Practice Act applies in the case of a student with a diagnosed medical condition who experiences foreseeable seizures.

4. The lower court erred in failing to require that the Ohio Board of Nursing enforce the Nurse Practice Act in Ohio's Schools.

{¶ 9} On cross-appeal, the School District assigns the following errors:

1. The trial court erred in denying the School Board's motion in limine.

2. The trial court erred in considering R.C. Chapter 4723, the Ohio Nurse Practice Act, in interpreting and applying R.C. 3313.713, as R.C. 3313.713 is specifically exempted from the Act's provisions.

{¶ 10} Also on cross-appeal, the OBN assigns the following errors:

1. The lower court erred in determining that the Nurse Practice Act, R.C. Chapter 4723, overrides R.C. 3313.713, as R.C. 3313.713 is specifically exempted from the Nurse Practice Act's provisions.

2. The lower court erred in failing to consider the administrative rules of the Ohio Board of Nursing in pari material with the Nurse Practice Act.

3. The lower court erred in failing to defer to the administrative judgment of the Board as to what actions constitute the unauthorized practice of nursing, what tasks require nursing judgment, and what constitutes an "emergency situation" under the Nurse Practice Act.

4. The lower court erred in failing to recognize that Ohio's regulatory scheme supports the authority of Ohio's citizens to enlist unlicensed individuals to assist them with medication administration.

5. The lower court erred in denying the Ohio Board of Nursing's motion in limine to exclude evidence of expert opinion on an issue of law.

*3 6. The lower court erred in denying the Ohio Board

of Nursing's motion to dismiss where the court did not have jurisdiction to grant the injunctive relief, and Plaintiffs were not entitled to mandamus relief.

{¶ 11} Because we find that this case is moot, we do not reach the merits of the arguments presented by these assignments of error.

{¶ 12} Actions are moot when " 'they involve no actual genuine, live controversy, the decision of which can definitely affect existing legal relations.' " *Lingo v. Ohio Cent. RR., Inc .*, Franklin App. No. 05AP-206, 2006-Ohio-2268, at ¶ 20, quoting *Grove City v. Clark*, Franklin App. No. 01AP-1369, 2002-Ohio-4549, at ¶ 11. See, also, *Robinson v. Indus. Comm.*, Franklin App. No. 04AP-1010, 2005-Ohio-2290, at ¶ 6 (holding that an action is moot "when a litigant receives the relief sought before the completion of the lawsuit * * * "). Ohio courts have long recognized that a court should not entertain jurisdiction over cases that are not actual controversies. *Tschantz v. Ferguson* (1991), 57 Ohio St.3d 131, 133; *State ex rel. Eliza Jennings, Inc. v. Noble* (1990), 49 Ohio St.3d 71, 74. If, while an action is pending, an event occurs, without the fault of either party, which renders it impossible for a court to grant any effectual relief, the court will generally dismiss the appeal. *Tschantz,* supra, quoting *Miner v. Witt* (1910), 82 Ohio St. 237, syllabus.

{¶ 13} In the case at bar, the controversy between the parties arose when school personnel adopted a protocol that required Lape and Orshoski to administer Diastat to Student Doe in the event he began seizing. As Student Doe no longer attends a school operated by the District, neither Lape, Orshoski, nor any other LSSA member is required to administer Diastat to him. Accordingly, with the controversy underlying this action resolved, this appeal is moot.

{¶ 14} In arguing otherwise, appellees posit that, even in the absence of a controversy, this court can consider the legal issues this case presents. In essence, appellees ask this court to issue an advisory opinion. Pursuant to well-settled precedent, we must decline to do so. *State ex rel. White v. Koch,* 96 Ohio St.3d 395, 2002-Ohio4848, at ¶ 18; *In the Matter of the Estate of Wise,* Franklin App. No. 04AP-1012, 2005-Ohio-5644, at ¶ 8.

{¶ 15} Next, the parties argue that the two exceptions to the mootness doctrine apply. First, the parties assert that the issues this action raises are capable of repetition yet evading review. Pursuant to this exception, although an action may be moot, a court may still resolve it if: "(1) the challenged action is too short in duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231. Here, the second criteria is satisfied. The School Board will probably again order non-nurse LSSA members to administer Diastat to a student, and the LSSA will probably file a lawsuit in response. However, the first criteria-that the challenged action is too short in duration as to avoid resolution-is not satisfied. We fail to see why a dispute over the administration of Diastat to a District student by LSSA members will necessarily (or even likely) evade review in the future. The District provides public education from kindergarten through the 12th grade. When a child, such as Student Doe, enters kindergarten with a Diastat prescription, any non-nurse LSSA members ordered to administer the drug could have 13 years in which to pursue an action such as this one.

***4** {¶ 16} The decision of *In re Appeal of Suspension of Huffer* (1989), 47 Ohio St.3d 12, does not alter our conclusion that this case is not one that would evade review. In *Huffer,* a high school student violated a school board policy prohibiting students from attending school while "under the influence" of drugs or alcohol. The Supreme Court of Ohio held that the action was one that was capable of repetition yet evading review because "students who challenge school board rules generally graduate before the case winds its way through the court system." *Id.* at 14. Although the court's reasoning is applicable to disputes centering on high school students, it is not relevant to disputes centering on elementary students. As an action such as the instant one can arise as early as a student's kindergarten year, *Huffer* is not dispositive.

{¶ 17} Appellants and the OBN also argue that the mootness doctrine does not apply here because the matters appealed are of great public or general interest. Even if a case is moot, a court may hear the appeal where the matter appealed is one of great public or general interest. *White,* supra, at ¶ 16. However, this court has restricted the use of this exception to rare occasions, recognizing that "it is only the highest court

of the state that adopts this procedure rather than a court whose decision does not have binding effect over the entire state." *Robinson,* supra, at ¶ 10, quoting *Nextel West Corp. v. Franklin Cty. Bd. of Zoning Appeals,* Franklin App. No. 03AP-625, 2004-Ohio-2943, at ¶ 15. See, also, *Brown v. Brown,* Franklin App. No. 03AP-1205, 2005-Ohio-2425, at ¶ 18.

{¶ 18} We conclude that this case is not of such great public or general interest to meet the high threshold necessary to except it from the mootness doctrine. Approximately 6,000 students attend schools operated by the District, but the superintendent can only identify six students to whom non-nurse school personnel might have to administer Diastat. Although we do not question the significance of this matter to those six students or to the affected school personnel, the issues presented by this case appear to impact a limited number of individuals. Additionally, we note that the alleged conflict between R.C. 3313.713 and the Nurse Practice Act has existed since 1988, yet appellants are the first to seek a court's review of it. Thus, we conclude that the issues presented by this case are not of overwhelming urgency or import to a large spectrum of the public.

{¶ 19} For the foregoing reasons, we conclude that this action is moot and that no exception to the mootness doctrine applies. Thus, we dismiss this appeal.

Appeal dismissed.

BROWN and SADLER, JJ., concur.
Ohio App. 10 Dist.,2006.
State ex rel. Lancaster School Dist. Support Assn. v. Bd. of Edn. Lancaster City School Dist.
Not Reported in N.E.2d, 2006 WL 3008475 (Ohio App. 10 Dist.), 2006 -Ohio- 5520

END OF DOCUMENT

PROOF OF SERVICE

American Nurses Association et al. v. O'Connell et al.,
Cal. App. 3 No. C061150 (Sacto. Super. Ct. 07AS04631)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105. On December 23, 2009, I served the following document(s) by the method indicated below:

REPLY BRIEF OF APPELLANT AMERICAN DIABETES ASSOCIATION

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 23, 2009, at San Francisco, California.

Myra R. Taylor