

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AMERICAN NURSES ASSOCIATION, *et al.*,

Plaintiffs-Respondents

v.

JACK O'CONNELL, SUPERINTENDENT OF PUBLIC INSTRUCTION, *et al.*,

Defendants-Appellants

AMERICAN DIABETES ASSOCIATION,

Intervenor-Appellant

On Review From The Court Of Appeal, Third Appellate District, No. C061150

On Appeal From The Sacramento County Superior Court, No. 07AS04631
Honorable Lloyd G. Connelly

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING
INTERVENOR-APPELLANT AND URGING REVERSAL

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QUESTION PRESENTED

The United States will address the following issue:

Whether California's Nursing Practice Act, as interpreted by the Court of Appeal and applied to this case, is preempted by Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, or the Individuals with Disabilities Education Act.

INTEREST OF THE UNITED STATES

This case affects the rights of students with disabilities under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504); Title II of the

Americans with Disabilities Act (ADA), 42 U.S.C. 12132 (Title II); and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* The United States Attorney General has authority to bring civil actions to enforce Title II and Section 504 and has promulgated regulations implementing both statutes. See 42 U.S.C. 12133, 12134(a); 29 U.S.C. 794a; 28 C.F.R. Pt. 35, App. B, Subpt. F (2011); 28 C.F.R. Pts. 35 and 41. The United States Department of Education also has promulgated regulations implementing Section 504 in the education context and administratively enforces Section 504 and Title II in that context. See 34 C.F.R. Pt. 104; 28 C.F.R. 35.190(b)(2). In addition, the United States Department of Education administers the IDEA and has issued regulations implementing that statute. 20 U.S.C. 1402(a), 1417(a); 34 C.F.R. 300.1-300.818. The United States Department of Justice may, upon referral from the United States Department of Education, bring actions in federal court to enforce the IDEA. See 20 U.S.C. 1416(e).

BACKGROUND AND STATEMENT OF THE CASE

A. Federal Statutes At Issue

As previously noted, this case implicates three federal disability rights statutes: the IDEA, Section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act. A review of those statutes and their

implementing regulations is necessary to understand the procedural posture of this case and the preemption issue that it presents.

1. IDEA

The IDEA requires States receiving federal IDEA funds to ensure that children with disabilities receive a “free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs.” 20 U.S.C. 1400(d)(1)(A); accord 20 U.S.C. 1412(a)(1) & (5). The term “free appropriate public education” means “special education and related services” that, *inter alia*, “have been provided at public expense, under public supervision and direction, and without charge.” 20 U.S.C. 1401(9). “Special education” is “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.” 20 U.S.C. 1401(29).

Under the IDEA, “related services” include such “supportive services * * * as may be required to assist a child with a disability to benefit from special education.” 20 U.S.C. 1401(26)(A). Those services include “school health services and school nurse services,” 34 C.F.R. 300.34(a), which are “health services that are designed to enable a child with a disability to receive FAPE.” 34 C.F.R. 300.34(c)(13); accord 20 U.S.C. 1401(26)(A). “School health services are services that may be provided by either a qualified school nurse *or other qualified person.*” 34 C.F.R. 300.34(c)(13) (emphasis added). Thus, if a student needs a

health-related service during the school day in order to attend school and benefit from the special education program, the school has an obligation under the IDEA to provide that service free of charge. See *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984) (requiring school to provide catheterization); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73-79 (1999) (requiring school to provide nursing services for a student on a ventilator).

The statute requires the development of an “individualized education program” (IEP) for each child with a disability who needs special education. 20 U.S.C. 1414(d)(1); see also 20 U.S.C. 1401(14), 1412(a)(4). The IEP is “a comprehensive statement of the educational needs of a [child with a disability] and the specially designed instruction and related services to be employed to meet those needs.” *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 368 (1985); see 20 U.S.C. 1414(d)(1)(A). The school must implement the student’s IEP. 20 U.S.C. 1414(d)(2)(A).

Some children with diabetes are covered by the IDEA. See 34 C.F.R. 300.8(c)(9); 4AA 878;¹ National Diabetes Education Program, *Helping the Student*

¹ “_AA _” refers to pages in Appellant’s appendix by volume. “Op. _” and “Concurrence _” refer to pages in the Court of Appeal’s opinions, published at 110 Cal. Rptr. 3d 305 (Cal. App. 3d Dist. 2010). “ANA Br. _” refers to pages in respondents’ answer brief.

with Diabetes Succeed: A Guide for School Personnel 56 (2003);² see also *McWhirt v. Williamson Cnty. Schs.*, No. 93-5783, 1994 WL 330027 (6th Cir. July 11, 1994); *Eads v. Unified Sch. Dist. No. 289*, 184 F. Supp. 2d 1122, 1125, 1137 (D. Kan. 2002). The IDEA applies to students with specific sensory impairments, learning disabilities, or intellectual impairments, as well as children with “other health impairments” who require special education. 20 U.S.C. 1401(3)(A)(i). For purposes of the IDEA, “[o]ther health impairment means having limited strength, vitality, or alertness * * * that results in limited alertness with respect to the educational environment, that * * * [i]s due to chronic or acute health problems such as * * * diabetes.” 34 C.F.R. 300.8(c)(9). If a student with diabetes is eligible for special education and related services under the IDEA, his IEP plan must address the diabetes-related care to which he is entitled at school. 4AA 878. Insulin administration can be one of the “related services” that the IDEA requires a school to provide to a student with diabetes to enable him or her to receive a FAPE. See 4AA 878.

² The National Diabetes Education Program is a federally sponsored, joint program of the National Institutes of Health and the Centers for Disease Control and Prevention. 4AA 817-818. The United States Department of Education endorses the use of this publication, and prepared pages 55-57 of the guide. 4AA 825. The 2003 edition is in the record at 4AA 817-900. A 2010 edition of the guide is available at http://ndep.nih.gov/media/youth_ ndepschoolguide.pdf.

2. *Title II Of The ADA And Section 504 Of The Rehabilitation Act*

a. *Overview*

Most students with diabetes are covered by Title II of the ADA and Section 504 of the Rehabilitation Act, whether or not they are also eligible for services under the IDEA. See 4AA 877. Title II of the ADA, applicable to public entities including schools, provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. 12132. Similarly, Section 504 provides that “[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. 794(a). The term “program or activity” includes “all of the operations” of a school system. 29 U.S.C. 794(b)(2)(B).

People who have diabetes will virtually always qualify as “persons with disabilities” under both the ADA and Section 504 of the Rehabilitation Act. Under the ADA, “disability” includes “a physical or mental impairment that substantially limits one or more major life activities of [an] individual,” 42 U.S.C. 12102(1)(A), and Congress has mandated that the ADA’s definition of disability also apply to

Section 504. See 29 U.S.C. 705(9)(B), 705(20)(B) (applying that definition to Subchapter V of the Rehabilitation Act, which includes Section 504). Diabetes is an impairment under the ADA, 28 C.F.R. 35.104, and, hence, also under Section 504. In the ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553, Congress clarified that a “major life activity” includes, *inter alia*, “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. 12102(2)(B). Diabetes adversely affects the operation of major bodily functions, including the digestive and endocrine systems. See *Rohr v. Salt River Project Agric. Imp. & Power Dist.*, 555 F.3d 850, 858 (9th Cir. 2009) (explaining that diabetes “affects the digestive, hemic and endocrine systems”). “Diabetes is a chronic disease in which the body does not make or properly use insulin, a hormone needed to convert sugar, starches, and other food into energy,” and without insulin treatment, “[h]igh levels of glucose build up in the blood and spill into the urine” and, as a result, “the body loses its main source of fuel.” 4AA 828.

In the ADA Amendments Act of 2008, Congress mandated that “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as * * * medication.” 42 U.S.C. 12102(4)(E)(i)(I). Thus, the ameliorative

effects of insulin on diabetes cannot be taken into account in deciding whether the disease substantially limits the major bodily functions of a person with diabetes.

b. FAPE Requirements

The United States Department of Education has promulgated regulations interpreting Section 504 in the context of education. See 34 C.F.R. Pt. 104. “The obligation to comply with [those regulations] is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility for qualified handicapped persons to receive services.” 34 C.F.R. 104.10(a).

The Section 504 regulations require public elementary and secondary schools that receive federal financial assistance to provide a FAPE to children with disabilities “regardless of the nature or severity” of the children’s disabilities. 34 C.F.R. 104.33(a); see also *Smith v. Robinson*, 468 U.S. 992, 1017 (1984) (discussing FAPE requirement under Section 504 regulations). These Section 504 regulations define FAPE to include “the provision of regular or special education and related aids and services” that are “designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.” 34 C.F.R. 104.33(b)(1). Such “educational and related services” must be provided “without cost to the handicapped person or to his or her parents or guardian” (except for fees also imposed on nondisabled students and their

parents). 34 C.F.R. 104.33(c)(1). For those students who have a Section 504 plan requiring insulin doses during the school day, insulin administration is considered one of the “related aids and services” that the school must provide as part of its FAPE obligations under the Section 504 regulations. 4AA 877. Where a child is entitled to services under Section 504, the school typically issues a “Section 504 plan” describing the child’s needs and how they will be met. See *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1102 (9th Cir. 2007); see also 4AA 877-878.

Title II and its regulations “shall not be construed to apply a lesser standard than the standards applied under [Section 504] or the regulations issued by Federal agencies pursuant to that [statute].” 28 C.F.R. 35.103(a); see also 42 U.S.C. 12134(b), 12201(a). Thus, the protections of Title II can be greater, but not less, than the rights provided by the Section 504 regulations.³

B. Facts And Procedural History

There are roughly 14,000 students with diabetes in California public schools. 4AA 904; 5AA 1140. About one in 400 school-age children has diabetes. 4AA 908; 5AA 1140. Most of these children require multiple insulin doses daily. 3AA 792; 5AA 1125, 1196, 1201, 1250, 1270, 1292, 1304. Many students use insulin

³ This brief focuses on the federal requirement that schools provide a FAPE to students with disabilities. It does not address all of the mandates that Section 504 and Title II impose in the educational context.

pumps while others require injections with a needle and syringe. Students often need injections or assistance with an insulin pump during the school day to cover regularly scheduled insulin doses as well as additional doses at unpredictable times in response to glucose fluctuations. 3AA 792. These students need access to insulin while on field trips or at after-school activities. 3AA 627, 716, 718, 723; 4AA 832, 844.

1. The American Diabetes Association's Federal Class Action And Settlement

In 2005, the American Diabetes Association and public school students with diabetes filed a class action in federal court against two local school districts, California's Superintendent of Public Instruction, the California Department of Education (CDE), and members of the state Board of Education. See *K.C. v. O'Connell*, No. 3:05-cv-04077-MMC (N.D. Cal.); 2AA 401. The *K.C.* plaintiffs alleged that the school districts violated Section 504, Title II of the ADA, and the IDEA by failing to ensure the provision of health care services, including insulin administration, necessary to provide a FAPE to students with diabetes. Op. 3; 2AA 402-403. In addition, the *K.C.* plaintiffs alleged that the state defendants failed to monitor local school districts' compliance with federal law. 2AA 404. According to the plaintiffs, there were not enough school nurses to meet the needs of students with diabetes. 2AA 403. The student plaintiffs, who were eligible for FAPE under IDEA or Section 504, asserted that their schools failed to administer

daily doses of insulin, would not administer glucagon even in life-threatening emergencies,⁴ and required parents or other relatives to come to school whenever the children needed scheduled or unscheduled insulin doses. 2AA 417-424. Those plaintiffs also alleged that the schools deprived them of access to field trips and after-school activities by refusing to assist them with diabetes-related care. 2AA 433.

The parties in *K.C.* settled, entering into individual agreements with the school districts and a class-wide agreement with the state defendants. 1AA 171; 6AA 1508. In 2007, as part of the settlement, defendant California Department of Education issued a legal advisory clarifying the rights of “students with diabetes who have been determined to be eligible for services under either the [IDEA] * * * or Section 504.” 1AA 215.⁵ In its legal advisory, the CDE explained that it interpreted California law to authorize seven “types of persons to administer insulin in California’s public schools pursuant to a Section 504 Plan or an IEP” (1AA 223):

⁴ Glucagon is an injectable medication that causes the liver to release glucose. It is necessary to quickly raise blood glucose levels if they fall dangerously low. 4AA 841.

⁵ The legal advisory used the term “Section 504” to “mean both Section 504 as well as the ADA unless otherwise noted,” because the CDE interpreted Section 504 and the ADA to provide identical protections in this context. 2AA 215.

1. self administration, with authorization of the student's licensed health care provide[r] and parent/guardian;
2. school nurse or school physician employed by the [local school district];
3. appropriately licensed school employee (*i.e.*, a registered nurse or a licensed vocational nurse) who is supervised by a school physician, school nurse, or other appropriate individual;
4. contracted registered nurse or licensed vocational nurse from a private agency or registry, or by contract with a public health nurse employed by the local county health department;
5. parent/guardian who so elects;
6. parent/guardian designee, if parent/guardian so elects, who shall be a volunteer who is not an employee of the [local school district]; and
7. unlicensed voluntary school employee with appropriate training, but only in emergencies as defined by Section 2727(d) of the [California] Business and Professions Code (epidemics or public disasters).

1AA 223-224.

To ensure compliance with federal law, the CDE's legal advisory added an eighth category of persons eligible to administer insulin in certain circumstances:

When no expressly authorized person is available under categories 2-4, *supra*, [*i.e.*, when no licensed nurse or physician is available], federal law – the Section 504 Plan or the IEP – must still be honored and implemented. Thus, a category #8 is available under federal law:

8. voluntary school employee who is unlicensed but who has been adequately trained to administer insulin pursuant to the student's treating

physician's orders as required by the Section 504 Plan or the IEP.

1AA 227. As the language of Section 8 makes clear, this provision applies only when all of the following preconditions are met: (1) a child has a Section 504 plan or an IEP requiring insulin administration; (2) there is no licensed nurse or physician available to administer the insulin; (3) a non-licensed school employee voluntarily agrees to administer the insulin; (4) the employee is adequately trained; and (5) the administration of insulin by the employee is consistent with the orders of the child's treating physician. 1AA 227. In explaining the need for Section 8, the settlement stated that "[i]n CDE's view, [local education agencies] must also meet federal requirements – even if the personnel expressly authorized by California are not available. In practical terms, this means that the methodology followed by some [local education agencies] of training unlicensed school employees to administer insulin during the school day to a student whose Section 504 Plan or IEP so requires it is a valid practice." 1AA 224-225.

2. *The Nurses Associations' Action In State Court*

After the CDE issued the legal advisory, the American Nurses Association and other nurses organizations (collectively ANA) filed a petition for a writ of mandate in California Superior Court against the CDE and the state Superintendent of Public Instruction, and asked the court to enjoin application of Section 8 of the legal advisory. Op. 4-5. The ANA argued, *inter alia*, that Section 8 is inconsistent

with California's Nursing Practice Act (NPA), Bus. and Prof. Code 2700 *et seq.*, which prohibits unlicensed individuals from "engag[ing] in the practice of nursing." Bus. & Prof. Code 2732; Op. 5. The American Diabetes Association intervened in support of the state defendants. Op. 5.

a. Facts Presented To The Superior Court

There is a shortage of nurses in California, and in particular a shortage of school nurses. 2AA 378; 3AA 795, 801-802; 4AA 922, 930, 937; 6AA 1399, 1505, 1520, 1531. For the 2005-2006 school year, the CDE reported a statewide student-to-nurse ratio of 2227 to 1. 6AA 1590. In some California school districts, the student-to-nurse ratio is more than 6600 to 1. 4AA 957. Many school districts do not have *any* school nurses. 3AA 627, 794; 5AA 1307. Some schools may have a nurse visit a few times per year or a part-time nurse serving an entire school district. 4AA 1055, 1068. Only 7% of California schools have a full-time credentialed school nurse. 6AA 1557, 1577.⁶

Because so many schools lack nursing staff, some simply do not follow physicians' orders for insulin administration and other care. 3AA 627-628. Some

⁶ These facts are similar to those reported last year by the CDE. In May 2010, the CDE reported there were 2155 children for each school nurse, that there were on average 7000 schools where no nurse was present on a given day, and that about half of the state's school districts had no school nurses at all. See *CDE News Release #10-49* (May 11, 2010), available at <http://www.cde.ca.gov/nr/ne/yr10/yr10rel49.asp>.

schools call a nurse from another school or hire an independent contractor nurse when a student needs insulin, but these actions result in delays that are disruptive to a student's school day and pose a potential health risk. 3AA 796-797, 799. The American Diabetes Association pointed to several specific cases where children were denied access to insulin, and cited to experts' observations of widespread problems with insulin not being provided on a timely basis, or at all. 3AA 627-628, 794. Because a child with diabetes may require insulin at unpredictable times, even a full-time nurse on staff at each school where a child has diabetes could not fully meet the child's needs. If nurses alone are to administer insulin, back-up nurses are needed to cover school trips, after-school activities, and times when a nurse is absent or attending to other students. 3AA 627, 718, 795.

If students do not get insulin as needed, they can suffer severe headaches, stomach aches, thirst, nausea, blurry vision, and decreased cognitive functions. 3AA 636, 795; 4AA 829. The situation can become life-threatening. 3AA 636, 795; 4AA 829. There are also long-term consequences, including damage to blood vessels, delayed growth, heart disease, blindness, kidney failure, and amputations. 3AA 798.

Some children's diabetes care plans have been changed, risking their health, to accommodate schools' insulin administration restrictions. 3AA 628. One expert stated that some children are forced to self-administer insulin at an earlier

age than would otherwise be appropriate or are put on a regimen of reduced insulin injections because schools will not provide care. 3AA 793, 796. Reduced insulin doses may have serious long-term health effects. 3AA 793.

Some schools have required parents to visit the schools during the day to administer insulin to their children. 3AA 637-638, 793-794. Several parents who submitted affidavits in this case have been forced to forgo employment and training or quit their jobs because of the frequent trips to school to administer their children's injections or provide other diabetes-related care. 3AA 641, 678, 793-794; 5AA 1244, 1294. With no one at school to take responsibility for their children, some parents must be "on call" during the school day and cannot attend to other responsibilities, such as medical appointments for their other children. 3AA 640, 677. Even where employees have volunteered to administer insulin, schools have barred them from doing so. 3AA 675; 5AA 1151-1152. At least one school would not commit to administering glucagon (see p. 11 n.4, *supra*) even if there were a life-threatening situation, because of school policies against lay persons giving injections. 5AA 1251. This was the case even though school officials had been trained in giving glucagon injections. 5AA 1251.

In addition, children may miss out on classroom time while they wait in a school office for a parent to arrive and administer insulin. 3AA 707; 5AA 1206. A child experiencing hyperglycemia and awaiting treatment may have difficulty

concentrating and may experience blurred vision and other symptoms that interfere with learning. 3AA 636; 5AA 1211.

b. Health Care Providers' And Educators' Positions On Insulin Administration

Medical experts widely support the use of unlicensed, trained school personnel to administer insulin. See 4AA 838, 909-911, 918. At the petition stage in this case, several medical groups – including the American Academy of Pediatrics and the American Association of Clinical Endocrinologists – submitted letters to this Court supporting the American Diabetes Association's position. In addition, the American Medical Association, agrees that, while administration by a nurse is ideal, nonmedical school personnel should be trained to provide diabetes care, including insulin administration, where a nurse is not available. 4AA 909-911, 918-919. Family members and children themselves (often from age 10) routinely administer insulin. Indeed, as most insulin administration is done by lay persons, insulin delivery systems – such as syringes or pumps – are designed for use by non-licensed personnel. 6AA 1647-1650. Nonlicensed people do not often make mistakes in administering insulin, and errors in dosage can be corrected with follow-up care. 3AA 798; see also 3AA 627. Training for insulin administration takes one or two hours. 3AA 797.

Educators have also widely embraced this view. The CDE endorsed it in the legal advisory at issue in this case. See 1AA 223-224. The California School

Boards Association (CSBA), which represents over 1000 California school districts and school boards, filed an amicus letter with this Court in support of the American Diabetes Association's petition for review. Noting that lay people can safely administer insulin, the CSBA stated that "the [Court of Appeal's] overly-broad interpretation of the NPA puts the health and safety of California's school children at risk and places school districts in an untenable position." CSBA Amicus Letter 1. "In reaching [its] holding, the Court of Appeal must have assumed that a school nurse or other licensed nurse would be available to provide the services to students," the CSBA explained, "but given the ratio of students to school nurses, such an assumption is patently false." *Id.* at 3.

Indeed, some school districts in California *have* allowed trained but unlicensed staff to assist students in insulin administration. Alpine County Unified School District, a small rural district, has one student with diabetes and a nurse who works one day per week. 4AA 974. The student uses an insulin pump, and staff members have been trained to use it. 4AA 974. Jacoby Creek Charter District does not employ nurses to provide medical care to students, but staff members are trained to administer insulin injections. 4AA 999. In Albany School District, unlicensed school employees have provided insulin injections to an elementary school student. 5AA 1305-1307. That district has no school nurses,

and several non-medical staff members are trained to provide care. 5AA 1306-1307.

3. *The Superior Court's Decision*

The Superior Court found the ANA's position "dead wrong" as a matter of "public policy," but agreed with its interpretation of California law. 8AA 1919. The court held that Section 8 of the CDE's legal advisory was invalid, even though unlicensed school personnel "have been adequately trained to administer insulin and even though evidence presented in this proceeding indicates that unlicensed persons with adequate training may safely administer insulin." 8AA 2020. The court rejected the state defendants' and the American Diabetes Association's arguments that federal antidiscrimination laws preempted state law restrictions on insulin administration in schools. 8AA 1944-1946. The trial court found no conflict between state and federal law. 8AA 1945.

4. *The Court Of Appeal's Decision*

The California Court of Appeal (Third District) affirmed the Superior Court's ruling, agreeing that Section 8 of the legal advisory was invalid under state law. The court concluded that California law does not "allow designated voluntary school personnel, who are not licensed nurses, to administer insulin to diabetic students who require the injections under a Section 504 Plan (29 U.S.C. 794; 34

C.F.R. § 104.1 *et seq.*) or Individualized Education Program (IEP) (20 U.S.C. § 1414, subd. (d)).” Op. 2.

The court also held that federal law did not preempt state law as applied to Section 8 of the CDE’s legal advisory. Op. 33-38. According to the court, the American Diabetes Association failed to show the number of students who require insulin administration, provide data on the availability of nurses, or prove that schools cannot overcome funding problems to hire sufficient numbers of nurses to meet federal law requirements. Op. 36. The court therefore held that state law did not “frustrate or stand as an obstacle to the purposes of the federal law in assuring students with disabilities free appropriate public education because schools can comply with both the federal law and the California law.” Op. 38.

In a concurring opinion, Justice Scotland emphasized that, in his view, “allowing trained school personnel other than nurses to administer insulin injections for diabetic public school students when necessary would be the wiser public policy decision.” Concurrence 2. He explained that:

The American Diabetes Association * * * and the California Department of Education (CDE) made a showing in the trial court that (1) thousands of public school students have diabetes and are in need of insulin injections during the school day, (2) there is a severe shortage of school nurses to assist these students by administering insulin injections, (3) properly-trained school personnel who are not nurses can safely inject insulin, and (4) without such assistance, the health of diabetic students will be at risk.

Concurrence 1. He noted that many prominent medical associations supported lay administration of insulin, and suggested that the ANA's position might be "a labor organization protecting its turf." Concurrence 1-2.

ARGUMENT

THE COURT OF APPEAL'S INTERPRETATION OF THE NURSING PRACTICE ACT, AS APPLIED TO THIS CASE, CONFLICTS WITH AND THUS IS PREEMPTED BY FEDERAL LAW

The Court of Appeal has interpreted the State's Nursing Practice Act (NPA) in a way that creates a serious obstacle to the ability of California schools to comply with their federal obligations to provide a free appropriate public education (FAPE) to children with disabilities. Specifically, the court interpreted the NPA to prohibit unlicensed, trained school employees from administering insulin to students with diabetes, even if school nurses or other licensed medical personnel are unavailable to do so. Relying on this interpretation of state law, the Court of Appeal invalidated Section 8 of a legal advisory issued by the California Department of Education, which would have allowed unlicensed school employees to administer insulin when all five of the following conditions are met: (1) the

student with diabetes has an IEP or Section 504 plan requiring insulin administration as part of the school's federal obligation to provide a FAPE; (2) no nurse or physician is available to administer the insulin; (3) an unlicensed school employee has voluntarily agreed to administer the insulin; (4) that employee has been adequately trained; *and* (5) the administration of insulin by the employee is consistent with the orders of the student's physician.

The Court of Appeal's interpretation of the NPA, as applied to the circumstances set forth in Section 8 of the CDE's legal advisory, conflicts with and thus is preempted by federal law. To be clear, the United States is *not* arguing that the NPA is facially invalid, and the federal government takes no position here on whether federal law would preempt California's NPA if applied to factual scenarios different from the one described in Section 8 of the legal advisory.

A. State Laws Are Preempted Where They Present Obstacles To Compliance With Federal Obligations

Under the Supremacy Clause, a state statute is preempted to the extent it conflicts with federal law. See U.S. Const. Art. VI, Cl. 2. State law conflicts with federal law either (1) when it is impossible to comply with both state and federal law *or* (2) "where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000) (citation omitted); accord *Dowhal v.*

SmithKline Beecham Consumer Healthcare, 32 Cal. 4th 910, 929 (Cal. 2004).

“What is a sufficient obstacle [to trigger preemption] is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” *Crosby*, 530 U.S. at 373. In determining whether state law is preempted, courts must consider “the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.” *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). The United States Supreme Court has “held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes,” *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), and that “[f]ederal regulations have no less pre-emptive effect than federal statutes,” *Fidelity Federal Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

In a number of contexts, federal and state courts have correctly held that federal disability rights laws – including Section 504, the ADA, and the IDEA – preempt state statutes to the extent they conflict with federal mandates. See, e.g., *Hacienda La Puente Unified Sch. Dist. v. Honig*, 976 F.2d 487, 492-496 (9th Cir. 1992) (state laws must yield to the extent they impede exercise of IDEA rights); *Helms v. McDaniel*, 657 F.2d 800, 805-806 (5th Cir. 1981) (Section 504 and IDEA preempted state laws governing hearing procedures), cert. denied, 455 U.S. 946 (1982); *Robert M. v. Benton*, 634 F.2d 1139, 1142 & n.11 (8th Cir. 1980) (same as

to IDEA)⁷; *County of Los Angeles v. Smith*, 88 Cal. Rptr. 2d 159, 175 (Cal. App. 2d Dist. 1999) (state law preempted to extent it conflicts with IDEA requirements); *Doolittle v. Meridian Joint Sch. Dist. No. 2*, 919 P.2d 334, 341-342 (Idaho 1996) (IDEA preempted a portion of the state constitution, at least as applied to a child who was denied a FAPE); *Weaver v. New Mexico Human Servs. Dep't*, 945 P.2d 70, 76 (N.M. 1997) (invalidating state welfare regulation because it conflicted with the ADA); see also *Astralis Condo. Ass'n v. HUD*, 620 F.3d 62, 69-70 (1st Cir. 2010) (defendant could not permissibly rely on Puerto Rico law to refuse to provide an accommodation required under the federal Fair Housing Act for a person with a disability); *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996) (concluding that Hawaii's animal quarantine law, as applied to guide dogs, interfered with the state's compliance with Title II of the ADA); *Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1232-1233 (10th Cir. 2009) (emphasizing that proposed accommodation under the ADA is not unreasonable simply because it might require defendants to violate state law). Cf. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 893 (1984) (noting that even if defendant's reading of Texas law were correct, it would "conflict[] with the Secretary's reasonable interpretation of congressional intent" in enacting the IDEA).

⁷ When *Helms* and *Robert M.* were decided, the IDEA was known as the Education for All Handicapped Children Act.

B. The Federal FAPE Requirements Preempt California's NPA As Applied To The Circumstances Described In Section 8 Of The CDE's Legal Advisory

When applied to the circumstances described in Section 8 of the legal advisory, the NPA (as interpreted by the Court of Appeal) stands as an obstacle to California schools' compliance with their federal FAPE obligations. See pp. 3-9, *supra* (discussing FAPE requirements under federal law). Section 8 does not apply unless the student is entitled to insulin administration at school pursuant either to a Section 504 Plan or to an IEP under the IDEA. Therefore, by definition, the only students covered by Section 8 are those who have a right to receive insulin as part of their school's federal FAPE obligations. Equally importantly, Section 8 applies only if a nurse or physician is unavailable to administer the insulin for the child; if a nurse or physician is available, the exception to state law provided by Section 8 is never triggered. Thus, in the circumstances described in Section 8 of the legal advisory, federal law would require the provision of insulin by a properly trained lay person, and the NPA is preempted to the extent that it precludes such a result.

Contrary to the Court of Appeal's assertion (Op. 36), the evidence in this case requires a finding of conflict preemption. The court asserted that the American Diabetes Association had failed to show the number of students who require insulin administration, provide data on the availability of nurses, or prove that schools cannot overcome funding problems to hire sufficient numbers of nurses to meet federal law requirements. Op. 36. The court's reasoning is flawed.

First, the Court of Appeal seemed to lose sight of the fact that this case involves an *as-applied* preemption analysis, rather than a facial challenge to the state statute. The proper question here is whether California's NPA is preempted as applied to the circumstances described in Section 8 of the NDE's legal advisory – not whether it would be preempted in all factual scenarios. Because Section 8 would only apply if a physician or nurse were unavailable to administer the insulin, the American Diabetes Association had no obligation to show how often nurses would be unavailable. If nurses are available to administer insulin in a particular situation, Section 8 is not triggered.

Second, conflict preemption does not require a showing that compliance with both state and federal law is impossible, *Crosby*, 530 U.S. at 372-373, and “does not require a direct contradiction between state and federal law.” *Dowhal*, 32 Cal. 4th at 929. As this Court has properly recognized, conflict preemption also exists where the state law, as applied to the circumstances of a particular case, “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of federal law. *Ibid.*; accord *Crosby*, 530 U.S. at 373. That is the case here.

The evidence in this case establishes that, under the regime sanctioned by the Court of Appeal's ruling, some students have been deprived of their federal right to a FAPE. The American Diabetes Association produced evidence that

many schools in California have failed to provide necessary insulin doses to students with diabetes because of the unavailability of nurses to administer insulin. In some instances, students' health suffered because they did not receive prescribed insulin doses. Such denials of federal FAPE rights will almost certainly continue in many California schools if the Court of Appeal's ruling stands. Some school districts have no school nurses at all. And in some school districts with nurses, the ratio of nurses to students is so low – as low as one nurse for every 6600 students – that it is inconceivable that a nurse could be available every time a student with diabetes needed help with insulin administration. That is especially true given that some students with diabetes may often need several insulin doses each school day, including at unpredictable times. See 4AA 843. Under the Court of Appeal's determination, school districts with no nurses – including small, rural districts like Alpine County District – will have to abandon their practice of allowing unlicensed volunteers to administer insulin. 4AA 974; 5AA 1305-1307.

Even if it were theoretically possible for all schools in California to immediately hire sufficient numbers of nurses to enable them to comply with both state and federal law, that outcome is extremely unlikely. CDE has reported that a state “budget crisis” has forced schools to lay off nurses. See *CDE News Release #10-49* (May 11, 2010), available at <http://www.cde.ca.gov/nr/ne/yr10/yr10rel49.asp>; *CDE News Release #11-04* (January 6, 2011), available at

<http://www.cde.ca.gov/nr/ne/yr11/yr11rel04.asp>. Roughly 30% of the state's children attend schools facing "serious financial jeopardy." *CDE News Release #11-25* (March 21, 2011), available at <http://www.cde.ca.gov/nr/ne/yr11/yr11rel25.asp>. And even if the funds were available, it is doubtful that schools could hire enough nurses in light of evidence in the record that California is experiencing a severe shortage of nurses. 2AA 378; 3AA 801-802; 4AA 922, 930, 937; 6AA 1399, 1505, 1520, 1531. This evidence amply shows that the Court of Appeal's interpretation of the NPA stands as an obstacle to achievement of the goals of federal law. Furthermore, as previously noted, if California does hire enough nurses to comply with FAPE obligations, nurses will be available and Section 8 will be inapplicable.

The ANA argues, however, that school districts can satisfy their federal FAPE obligations by simply allowing parents or parental designees to come to the schools to administer the insulin themselves. See ANA Br. 33-35.⁸ But that

⁸ The ANA cites two ADA settlements from the 1990s that the United States Department of Justice reached with day care facilities regarding children with diabetes. See ANA Br. 37 n.12 (citing *McDavid v. Arthur*, 437 F. Supp. 2d 425, 429 (D. Md. 2006)). Neither of these settlements is relevant here as neither involved a school setting or federal FAPE requirements. And, of course, a settlement agreement is a compromise and cannot be taken as a definitive statement of the government's position on the remedy that the law would require in a litigated judgment. The 1995 agreement with KinderCare, enforcing Title III of the ADA, required the day care center to admit children regardless of whether they had diabetes and to monitor their blood glucose levels as needed, but did not

(continued . . .)

argument overlooks the requirement that a free appropriate public education be “free.” See 20 U.S.C. 1401(9) & 1401(29) (under IDEA, special education and related services must be “provided at public expense” and “at no cost to parents”); 34 C.F.R. 104.33(c)(1) (under Section 504 FAPE regulations, “educational and related services” must be provided “without cost to the handicapped person or to his or her parents or guardian”). If parents (or their designees) are required to give up their time – including, in some instances, taking leave from work – to come to the school to provide the service themselves, the school is failing to provide that service for free and hence is violating its federal FAPE obligations.

The parents in *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999), faced an analogous situation. For several years, a family member or a nurse hired by the family came to the school to provide health services to a

(. . . continued)

obligate the center to give insulin injections. See KinderCare Settlement Agreement, available at <http://www.ada.gov/kinder1.htm>. The settlement emphasized that it did “not purport to remedy any other potential violations of the ADA not directly addressed in this Agreement,” and that nothing in the settlement “relieve[d] KinderCare of its responsibility to comply with any other Federal, State, or local law or regulation.” *Id.* at ¶ 29. The United States Department of Justice’s 1997 settlement agreement with another day care provider, La Petite Academy, similarly provided for glucose monitoring, but did not provide for insulin injections. See La Petite Academy settlement, available at <http://www.ada.gov/lapetite.htm>. In more recent settlements, the federal government has required day camps and similar institutions to train employees in insulin and glucagon administration. See TSI Settlement Agreement, available at <http://www.ada.gov/tsi.htm>; Pine Hills Settlement agreement, available at <http://www.ada.gov/pinehillscare.htm>.

student who used a ventilator. *Id.* at 70. When the school district refused the parents' request to accept financial responsibility for those services, the Supreme Court held that they were "related services" that the school district had an obligation to fund under the IDEA. *Id.* at 79. The fact that the family members in *Garret F.* had been able to provide the services themselves (either by coming to the school or hiring a nurse to do so) did not excuse the school district's responsibilities under the IDEA. Likewise, requiring parents or their designees to administer insulin to children during the school day does not fulfill California schools' federal FAPE obligations.

* * * * *

The Court of Appeal's interpretation of the NPA, as applied to the circumstances described in Section 8 of the CDE's legal advisory, presents an obstacle to California schools' compliance with their federal FAPE obligations and, to that extent, is preempted by federal law. The United States takes no position on whether the Court of Appeal correctly interpreted California law. But if that interpretation is correct, the Court of Appeal erred in rejecting the American Diabetes Association's preemption argument.

CONCLUSION

This Court should reverse the Court of Appeal's preemption ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 8.204(c)(1) and 8.360(b)(1) of the California rules of Court that this brief was prepared using Microsoft Word 2007 and contains no more than 7100 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

Date: May 11, 2011

APRIL J. ANDERSON
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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2011, I filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING INTERVENOR-APPELLANT AND URGING REVERSAL with the Clerk of the Court for the Supreme Court of California by Federal Express overnight delivery.

Furthermore, I certify that on May 11, 2011, I served a copy of the foregoing on the following parties by Federal Express overnight delivery:

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