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FILED / ENDORSED
DEC 26 2008
Christa Beebout
By Christa Beebout, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

AMERICAN NURSES ASSOCIATION;
AMERICAN NURSES ASSOCIATION/
CALIFORNIA; CALIFORNIA SCHOOL
NURSES ORGANIZATION; and
CALIFORNIA NURSES ASSOCIATION,

Dept. 33

No. 07AS04631

Plaintiffs/Petitioners,

v.

JUDGMENT

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

Defendants/Respondents.

AMERICAN DIABETES ASSOCIATION, an
organization,

Intervenor.

_____ /

Petitioners' Second Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief came on regularly for hearing in Department 33 of the above-entitled court on November 14, 2008, the Honorable Lloyd G. Connelly presiding. Carrie L. Bonnington and Pamela Allen appeared for petitioners; Robin B. Johansen and Kari Krogseng appeared for respondents; and James M. Wood, Larisa Cummings and Brian Dimmick appeared for intervenor. After considering the parties' pleadings, memoranda of points and authorities, declarations, exhibits and oral arguments in support and in opposition to the petition and

1 complaint, the court orally stated and explained its decision to partially invalidate respondent's
2 Legal Advisory on Rights of Students with Diabetes in California's K-12 Public Schools ("Legal
3 Advisory").

4 As more fully set forth in the transcript of the hearing, the court indicated that the
5 Legal Advisory improperly sanctions and authorizes school districts to use, in the absence of an
6 appropriately licensed health care professional, an unlicensed but adequately trained school
7 employee to administer insulin to a student pursuant to the orders of the student's treating
8 physician and in accordance with the requirements of the student's plan under section 504 of the
9 federal Rehabilitation Act of 1973 ("Section 504 Plan") and the student's individual education
10 plan ("IEP") under the federal Individuals with Disabilities Education Act ("IDEA") and
11 Education Code section 56340 et seq. State laws authorize the administration of insulin to a
12 student only by a licensed health care professional acting within the scope of practice for which
13 he or she is licensed under the Business and Professions Code (e.g., a nurse licensed under the
14 Nursing Practices Act, Business and Professions Code section 2700 et seq., to perform services
15 within the meaning of Business and Professions Code section 2725) or by an unlicensed person
16 who is expressly authorized by statute to administer insulin in specified circumstances (e.g.,
17 trained school personnel authorized by Education Code section 49414.5 to provide emergency
18 medical assistance to diabetic students suffering from severe hypoglycemia, a foster parent
19 authorized by Health and Safety Code section 1507.25 to administer medically prescribed
20 injections to a foster child in placement if the foster parent has been trained to do so by a licensed
21 health care professional acting within his or her scope of practice, or the parent of a student or an
22 individual designated by the parent to administer insulin to the student pursuant to Business and
23 Professions Code section 2727 and California Code of Regulations, title 5, section 604).

24 The court rejected the position of respondents and intervenor that respondent has
25 authority to adopt the Legal Advisory pursuant to Education Code sections 49423 and 49423.6.
26 Section 49423 provides for a school nurse or other designated school personnel to assist a student
27 who is required to take prescribed medication during the regular school day, and section 49423.6
28 requires respondents to develop regulations regarding the administration of medication in public

1 schools pursuant to section 49423. Nothing in these statutory provisions authorizes respondents
2 or school districts to designate school personnel who are not otherwise permitted to administer
3 insulin by the matrix of state statutory provisions which govern the scope of practice of licensed
4 health care professionals and expressly permit certain unlicensed personnel to administer insulin
5 in specified circumstances. Nor does the *assistance* authorized by section 49423 reasonably
6 encompass the *administration* of insulin; the plain meaning of assistance and administration as
7 well as the legislative history presented by the parties indicate that assistance is distinct from
8 rather than synonymous or interchangeable with administration.

9 The court also rejected the position of respondents and intervenor that the provisions
10 of the IDEA and section 504, requiring qualified school nurses or other qualified personnel to
11 administer insulin to students in accordance with the students' IEPs and Section 504 Plans,
12 preempt the state statutes delineating the personnel authorized to administer insulin when
13 statutorily authorized personnel are unavailable due to nursing shortages and fiscal constraints.
14 In those circumstances, according to respondents and intervenor, school districts must comply
15 with the superseding requirements of federal law and may designate school personnel who are
16 not statutorily authorized but who are adequately trained to administer insulin.

17 The court found that the state statutes do not conflict with or impede implementation
18 of the federal requirements for the administration of insulin by qualified personnel. Rather the
19 statutes identify licensed health care professionals and certain unlicensed persons who are
20 qualified to administer insulin, ruling out any basis for federal preemption. To the extent that
21 nursing shortages and fiscal constraints result in a lack of qualified personnel to administer
22 insulin to students in accordance with their IEPs and Section 504 Plans, the Legislature rather
23 than the court must resolve the matter on the basis of policy choices exclusively within the
24 Legislature's purview. The court must enforce the legislative policy choices in the existing
25 statutes delineating the personnel authorized to administer insulin and may not rewrite the
26 statutes to include other school personnel, even if those other personnel have been adequately
27 trained to administer insulin and even though evidence presented in this proceeding indicates that
28 unlicensed persons with adequate training may safely administer insulin.

1 Finally, the court determined that the portion of the Legal Advisory sanctioning the
2 administration of insulin to students by school personnel not authorized to do so under state
3 statutes is a regulation which has not been adopted in accordance with the rule-making
4 procedures of the Administrative Procedure Act (“APA”), Government Code section 11340 et
5 seq., and therefore is invalid. This portion of the Legal Advisory adds a new category to the
6 seven categories of persons authorized to administer insulin to public school students which are
7 listed in California Code of Regulations, title 5, section 604. The new category meets the APA’s
8 definition of a regulation because the category provides a guideline, instruction or rule to be
9 generally applied by school districts in implementing students’ IEPs and Section 504 Plans. (See
10 Government Code sections 11340.5, 11342.600.)

11 WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that:

12 1. Respondents’ Legal Advisory on Rights of Students with Diabetes in California
13 K-12 Public Schools is invalid and has no force or effect to the extent that it authorizes the
14 administration of insulin to students by school personnel who are not health care professionals
15 licensed to administer insulin within the scope of their practice under the Business and
16 Professions Code or other persons authorized by statute to administer insulin. Respondents lack
17 legal authority under state and federal laws to enlarge the group of persons who may administer
18 insulin under state statutes. In addition, respondents have not complied with the rule-making
19 requirements of the Administrative Procedure Act in authorizing the administration of insulin to
20 students by school personnel who are not authorized to administer insulin under state statutes, an
21 authorization constituting a regulation within the meaning of the APA.

22 2.. A peremptory writ of mandate shall issue from this court requiring respondents
23 to (a) refrain from implementing or enforcing those portions of the Legal Advisory on Rights of
24 Students with Diabetes in California K-12 Public Schools that sanction and/or authorize the
25 administration of insulin to students by school personnel who are not authorized to administer
26 insulin under state statutes, including the section on page 10 of the Legal Advisory entitled
27 “Reconciliation of State and Federal Law” and all text following category 7 of the “Checklist” on
28 page 13 of the Legal Advisory, and (b) delete those portions of the Legal Advisory.

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3. Petitioners shall recover their costs of suit pursuant to rule 3.1700 of the California Rules of Court.

4. The court reserves jurisdiction to hear and determine a motion for attorney fees pursuant to rule 3.1702 of the California Rules of Court.

Dated: **DEC 26 2008**



A handwritten signature in black ink, appearing to read "Lloyd G. Connelly", written over a horizontal line.

LLOYD G. CONNELLY
Judge of the Superior Court

RECEIVED

DEC 30 2008

RS

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

AMERICAN NURSES ASSOCIATION;
AMERICAN NURSES ASSOCIATION/
CALIFORNIA; CALIFORNIA SCHOOL
NURSES ORGANIZATION; and
CALIFORNIA NURSES ASSOCIATION,

Case Number: 07AS04631

CERTIFICATE OF SERVICE
BY MAILING (C.C.P. Sec. 1013a(4))

vs.

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

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing **JUDGMENT** and **PEREMPTORY WRIT OF MANDATE** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

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DEPT. OF EDUCATION
1430 N ST #5319
SACRAMENTO, CA 95814

I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Dated: December 29, 2008

By: C. BEEBOUT, *C. Beebout*
Deputy Clerk