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JODEE H. WEINRICH, CSR NO. 3060

1 FRIDAY, NOVEMBER 14, 2008

2 MORNING SESSION

3 --oOo--

4 The matter of American Nurses Association, American
5 Nurses Association/California and California School Nurses
6 Organization, Plaintiffs, versus Jack O'Connell, State
7 Superintendent of Public Instruction and State Department
8 of Education, the Respondents; American Diabetes
9 Association, Intervenor, Case Number 07AS04631, came on
10 regularly before the Honorable LLOYD G. CONNELLY, Judge of
11 the Superior Court of California, County of Sacramento,
12 sitting in Department 33.

13 The Petitioners, American Nurses Association, et al.,
14 was represented by Carrie L. Bonnington, Attorney at Law;
15 Pamela Allen, Attorney at Law; Maureen E. Cones, Attorney
16 at Law.

17 The Respondents, Jack O'Connell, State Superintendent
18 of Public Instruction and State Department of Education,
19 was represented by Robin B. Johansen, Attorney at Law; Kari
20 Krogseng, Attorney at Law, Attorney at Law.

21 The Intervenors, American Diabetes Association, was
22 represented by James M. Wood, Attorney at Law; Brian
23 Dimmick, Staff Attorney; Larisa Cummings, Attorney at Law.

24 The following proceedings were then had:

25 THE COURT: This is American Nurse's Association
26 versus Jack O'Connell, American Diabetes Association,
27 Intervenors, Case Number 07AS04631.

28 And let me start with this side of the table.

1 Yes, ma'am? Whoever.

2 MS. BONNINGTON: Good morning, your Honor, Carrie
3 Bonnington, Pillsbury, Winthrop, Shaw, Pitman, representing
4 American Nurses Association, American Nurses Association of
5 California; California School Nurses Organization.

6 To my right is Maureen Cones. She is senior counsel
7 for American Nurses Association, and to her right is Pamela
8 Allen, counsel for California Nurses Association.

9 THE COURT: Which one of you is going to speak?

10 MS. BONNINGTON: I expect Ms. Cones to do primarily
11 the speaking today, your Honor.

12 THE COURT: So I will ask you the questions.

13 MS. CONES: Thank you, your Honor.

14 THE COURT: Am I saying your name right, Ms. Cones?

15 MS. CONES: Cones like Jones with a C, your Honor.

16 THE COURT: Thank you. I have a hearing disability.
17 I assume there is a lot of sympathy for that in this room
18 regardless of your side.

19 Yes, ma'am.

20 MS. JOHANSEN: Good morning, your Honor, Robin
21 Johansen and Kari Krogseng from Remcho, Johansen & Purcell,
22 on behalf of the respondents, Jack O'Connell and California
23 Department of Education.

24 THE COURT: Okay.

25 MR. WOOD: Your Honor, good morning. I'm James Wood
26 with ReedSmith and Larisa Cummings from DREDF, on behalf of
27 Intervenor, American Diabetes Association.

28 THE COURT: Okay.

1 MR. WOOD: Also Brian Dimmick from the American
2 Diabetes Association.

3 THE COURT: And I won't write down the names of the
4 folks behind me, so if you speak -- behind you -- is that
5 all right? If you speak during the hearing, just introduce
6 yourselves anew if you would. Okay. Thank you.

7 Let me give the most remedial history. There are
8 good histories here, but I am saying this out loud. A
9 lengthy history of litigation surrounding B & P 2725 to
10 provide an exception, statutory exception to allow
11 nonlicensed, but trained personnel to administer injections
12 to children at school who have chronic diabetes.

13 There was most notably a Bill in 2002, that passed
14 the legislature was vetoed by Governor Davis, concern about
15 cost, liability, whatever. There has been multiple
16 legislative efforts since that time.

17 The concern was driven by the American Diabetes
18 Association and others who wanted to have this service,
19 that is, easy access to these type of injections for
20 children who suffered from diabetes and regulations
21 promulgated through 2725 by the Nursing Board were really
22 unambiguous that unlicensed personnel cannot give
23 injections of that type.

24 There were other exceptions that had been made
25 statutorily and even in the rulemaking process but not for
26 this situation.

27 Just let me pause. I understand this is grossly
28 simple, but is that a fair --

1 MS. JOHANSEN: Your Honor.

2 THE COURT: Up to this point?

3 MS. JOHANSEN: Up to this point, I don't think so.
4 With respect to the Court's statement about regulations
5 promulgated by BRN; there really are no such regulations.
6 The most --

7 THE COURT: They are policy -- I am sorry.

8 MS. JOHANSEN: It was a statement, policy statement
9 at best that BRN issued and basically said that what their
10 view was, but that they would await the outcome of this
11 proceeding.

12 THE COURT: Is that correct?

13 MS. CONES: Your Honor, actually your statement of
14 the law is, is correct under the Nursing Practice Act. The
15 statement that was issued to which Ms. Johansen referred
16 plainly on its face states that unlicensed personnel are
17 not permitted under the Nursing Practice Act.

18 THE COURT: Is this 2007, promulgation, is that what
19 we were talking about?

20 MS. CONES: It was Advisory that was issued in 2008.

21 THE COURT: You are familiar with the record, could
22 you just take a moment and pull that out so I can look at
23 it that.

24 MS. CONES: The Board of Nurses Advisory Opinion, I
25 believe, was issued in 2008, in response to --

26 THE COURT: I want to see it.

27 MS. CONES: -- settlement. Certainly, your Honor, I
28 have it available.

1 THE COURT: I am assuming you folks can find it
2 faster than I can in my stack in chambers. We'll just talk
3 a moment here. I have another item a 10:30. We may or may
4 not finish, but the other item is extremely brief, so we'll
5 take the time we need.

6 MS. CONES: I have that available, your Honor.

7 THE COURT: Let me just take a look at it. Would
8 you show it to Ms. Johansen so she knows what I am looking
9 at.

10 MS. CONES: Absolutely, your Honor. Is that the
11 same one?

12 MS. JOHANSEN: No. Which exhibit is this?

13 MS. CONES: Oh, I am sorry. You want November '07.

14 MR. WOOD: What exhibit is it?

15 MS. JOHANSEN: Yes. I have that as Exhibit C to the
16 Declaration of Dale Parent (Phonetic).

17 MS. CONES: That is correct.

18 THE COURT: Can one of you just bring that up to me
19 so I can look at it here. Was this issued before or after
20 the July 12th, Advisory Opinion?

21 MS. JOHANSEN: It was issued afterwards, your Honor.

22 THE COURT: Okay.

23 MS. JOHANSEN: It states on its face that it's
24 basically issued in response.

25 THE COURT: In response thereto.

26 MS. JOHANSEN: Correct.

27 THE COURT: Let me just have a second.

28 (Brief pause.)

1 THE COURT: Well, doesn't this do, what I said but
2 in a clumsier way, which says that this confirms their
3 position post Advisory. This is the California Nursing
4 Board's position. They call it Board of Registered Nurses,
5 right?

6 MS. JOHANSEN: Correct.

7 THE COURT: I'll make misstatements like that
8 throughout. It says there is these seven categories and
9 you can only use unlicensed voluntary personnel with
10 appropriate training in an emergency and you can't do it
11 otherwise; isn't that what this says?

12 MS. JOHANSEN: Well, that is what this says as the
13 BRN's position, your Honor, that it also says on page 2
14 that until the issue is resolved the school nurse should do
15 X.

16 THE COURT: Right.

17 MS. JOHANSEN: So it is not in any way a regulation
18 and certainly if --

19 THE COURT: It's a promulgation of policy by the
20 Nursing Board. Excuse me, Board of Registered Nurses.

21 MS. JOHANSEN: Board of Registered Nurses, correct.
22 I might note, your Honor, that particular agency is
23 noticeably absent in this litigation having issued this
24 Advisory. It has not made any attempt to either intervene
25 or provide anything.

26 THE COURT: Is your position then that but for -- or
27 even in the absence of the Advisory Opinion and, I think,
28 this may well be your opinion that unlicensed volunteer

1 school personnel that were appropriately trained could
2 administer these injections even to students that needed
3 them.

4 MS. JOHANSEN: Yes, your Honor. That's what the
5 Legal Advisory that settled this case recognized.

6 THE COURT: Okay. I think -- I think your -- in
7 some respects we're saying the same thing, but maybe we
8 aren't.

9 This is how I would characterize your position on
10 that is that, listen, Judge, they were just wrong and Legal
11 Advisory Opinion just concluded that and made it clear, and
12 so, yes, you were correct in saying that the statute and
13 policy promulgated by the Board of Registered Nurses
14 prohibited that activity, but it prohibited it erroneously.

15 MS. JOHANSEN: If I may, and I am really not trying
16 to quibble here. But, your Honor, you are correct -- the
17 Court is correct in characterizing the Board of Registered
18 Nursing's position. We do not agree that the statute,
19 Business and Professions Code Section 2725(b) prohibits it.

20 THE COURT: We'll get into that.

21 MS. JOHANSEN: And we'll get into that. I just want
22 to make very clear that's not part of -- we are certainly
23 not agreeing with that.

24 THE COURT: Okay.

25 MS. JOHANSEN: Thank you.

26 THE COURT: Fair enough. I think I understand the
27 distinction. Did you have anything else? I didn't want to
28 cut you off arbitrarily.

1 MS. CONES: Our position is 2725 does prohibit that.

2 THE COURT: I understand that. We're going to spend
3 a lot of time on that in a minute. Then the American
4 Diabetes folks go to court in Federal Court before Judge
5 Chesney, am I pronouncing her name right?

6 MR. WOOD: That's correct, your Honor.

7 MS. JOHANSEN: Correct.

8 THE COURT: And filed a lawsuit and then the lawsuit
9 was dismissed. And the language of the Judge's order is
10 interesting. It's the lawsuit is dismissed because of the
11 settlement and the settlement is attached. There is no
12 issue here that there is a Judge's finding and order; is
13 that a fair statement?

14 MR. WOOD: Only -- yes, but it bears keeping in mind
15 too that Judge Chesney under the terms of the settlement
16 and by incorporation of the order to dismiss and retains
17 jurisdiction over the case.

18 THE COURT: Do you have her order there? I looked
19 at it earlier.

20 MR. WOOD: We do.

21 THE COURT: My memory is there is no order other
22 than the case is dismissed.

23 MS. CONES: My recollection as well.

24 THE COURT: I hear a lot of these writs and
25 sometimes I do the same thing. I say, oh, here's the
26 stipulated agreement. I really like this. I ordered this.
27 And sometimes we want to dismiss this lawsuit because we
28 resolved it. I say, okay, the lawsuit is dismissed;

1 attached is the stipulation of the parties that resulted in
2 dismissal. And it is that latter.

3 MS. JOHANSEN: No, not quite, your Honor. In this
4 case Judge Chesney's ordered incorporates the settlement
5 agreement.

6 THE COURT: Right.

7 MS. JOHANSEN: Which then provides for the Legal
8 Advisory.

9 THE COURT: Let me take a look at that again. You
10 know I left that, Rachel, I left that in my chambers. You
11 may be able to find this one faster. I have a little
12 yellow tab on it in my chambers. It's in the stack, I
13 think, on the couch.

14 While she looks for that and you look for it as
15 well, you could -- is your opinion then, Ms. Johansen or
16 Mr. Wood, that I am constrained by a Federal Court order?

17 MS. JOHANSEN: Your Honor, in our view all of us are
18 constrained by federal law. The Federal Court order
19 dismissing the case incorporates a settlement agreement
20 that is enforceable by returning to court for an
21 injunction.

22 It is not enforceable initially by contempt. I have
23 here the order.

24 THE COURT: And I have it here in front of me.
25 *Pursuant to the settlement agreement between the parties*
26 *the terms of which are expressly incorporated herein, it is*
27 *so ordered that the Jack O'Connell in his official*
28 *capacity, so forth and so on and so on, is dismissed.*

1 Your point is -- let me make this observation, see
2 if you would agree with it. There is no Court order at
3 this point from the State of California, "You must do
4 this," which I would be asked to contravene, but you folks
5 have the right to go back to Judge Chesney and seek such an
6 order, if she has continuing jurisdiction which I assume
7 she does.

8 MR. WOOD: She has continuing jurisdiction over the
9 order or any change in the Advisory.

10 THE COURT: Right. Do you agree with what I just
11 said though? Do you understand there is a distinction.
12 One is: Judge, you have to decide here whether or not
13 state law and federal law is in conflict in your
14 determination whether or not this Advisory Opinion has
15 force.

16 The other is: Judge, that issue isn't before you.
17 The federal judge has already decided that and ordered you
18 that there is a conflict and you must do this; is your
19 position it is the latter or the former?

20 MS. JOHANSEN: Your Honor, I believe it's the
21 former, but with this caveat and that is that the
22 Intervenor can go to Judge Chesney and while they cannot
23 ask for contempt as a sanction because there is at this
24 point no injunction issued against my clients, they can ask
25 for an enforcement, an injunction to enforce the agreement.

26 THE COURT: Right.

27 MS. JOHANSEN: So, with, with that caveat, yes.

28 THE COURT: Okay. And I'm going to stop you right

1 there because the Presiding Judge has got a problem that I
2 have to go solve. I would estimate it is five or ten
3 minutes. But he is the Presiding Judge, so if he calls I
4 go. I'm sorry.

5 MS. CONES: Very well, your Honor. Thank you.

6 THE COURT: Thank you.

7 (Brief pause.)

8 THE COURT: The bottom line on this last point is
9 the federal judge really didn't rule on whether the
10 Advisory Opinion was right or not. You can go back and
11 seek a ruling from the Judge and appropriate enforcement of
12 orders.

13 MR. WOOD: That's right, your Honor.

14 THE COURT: Just on this other issue with regard to
15 the status of the law before the Advisory Opinion, they
16 were actually regulations, were there not, from the
17 Educational Board, State Department of Education, excuse
18 me, that foreclosed administration of drugs in the kind of
19 context we talked about; is that accurate?

20 MS. JOHANSEN: Quite the opposite, your Honor.
21 Those regulations set out who may administer medications to
22 students. They used the word "administer" and they
23 specifically say "other designated school personnel." They
24 track the language of the statute.

25 THE COURT: Let me take a look at those again, can
26 I? Just a second, maybe I've got it here. So I'm looking
27 at program Advisory on medication administration,
28 California Code of Regulations Title 5 Article 4.1. And in

1 all your documents here, requests for judicial notice from
2 the petitioner.

3 MS. JOHANSEN: There --

4 THE COURT: Let me just finish here. Persons
5 authorized to administer medications at school Roman
6 numeral IV. Unlicensed school personnel designated by the
7 site administration administer medication if, and then one
8 of the "if's" is the unlicensed staff member does not
9 administer medication that must be administered by
10 injection.

11 MS. JOHANSEN: I am sorry, your Honor, could you --

12 THE COURT: I'm going to do better than that. I'm
13 going to return it and hand it to you. I got a little tab.
14 But why don't you look at it and share it with Ms. Cones,
15 if you want to look at it together.

16 MS. JOHANSEN: Thank you, your Honor. The
17 regulations that are, in fact, part of the California Code
18 of Regulations.

19 THE COURT: Um-um.

20 MS. JOHANSEN: Are at 5 CCR starting the section
21 600. Those are the ones that I'm referring to, the Program
22 Advisory.

23 THE COURT: Talk about this one first and then we'll
24 go to that one.

25 MS. JOHANSEN: All right. I am trying to figure
26 out, your Honor, which year this one was.

27 THE COURT: Okay. Take your time.

28 MS. JOHANSEN: This was the '05, 2005, Program

1 Advisory that the Department issued, but has since been
2 withdrawn, and I would point out to the Court that
3 regardless of what that says, first of all, we of course
4 have to look at the state law.

5 THE COURT: Before we move on without regard to what
6 that says; is that a valid regulation or not from your
7 point of view?

8 MS. CONES: Yes, the Program Advisory is valid under
9 section 611 of the CCR.

10 THE COURT: She indicates it has been withdrawn; is
11 that correct?

12 MS. CONES: Your Honor, I disagree that it has been
13 withdrawn based on they have published subsequent
14 Advisories one in 2006, and then subsequent questions and
15 answers on administration of medication which came after
16 the settlement was reached and, of course, state a
17 different interpretation of the law.

18 THE COURT: That one I read as well. That's the one
19 that really incorporates the Advisory Opinion; is that
20 correct?

21 MS. JOHANSEN: No.

22 THE COURT: That's not correct?

23 MS. JOHANSEN: This is 2005.

24 THE COURT: No, I am not talking about this one. I
25 am talking about the subsequent.

26 MS. CONES: That is correct.

27 MS. JOHANSEN: That is correct. And as we pointed
28 out in our brief, your Honor, throughout this entire

1 history of these Program Advisories, the Department has
2 always said that if a student has Section 504 plan nothing
3 can interfere with that. So, you know, contrary to the
4 arguments that petitioners have made, we have been
5 consistent on that.

6 THE COURT: Is there another regulation -- I cut you
7 off just to hear the other side, subsequent to this -- I am
8 sorry, what do they call this?

9 MS. JOHANSEN: Program Advisory.

10 THE COURT: Program Advisory or regulation from the
11 Department of Education, it makes it clear this is prior
12 now to the Advisory at issue here, that the Department of
13 Education's position is we have the authority and to
14 promulgate or to allow volunteers appropriately trained to
15 administer medication insulin in these situations; do you
16 understand my question?

17 MS. JOHANSEN: I think so.

18 THE COURT: I thought that's where you were going
19 and you were going to reference some other thing and show
20 me there is some subsequent Advisory from the Department of
21 Education as so stated. So I'm here.

22 MS. JOHANSEN: What we have are the regulations that
23 the legislature ordered the Department and the State Board
24 to promulgate back in 2001, I believe it was, 2000, and
25 you'll find that statute -- and it is a very important
26 statute, your Honor.

27 THE COURT: I'm going to interrupt you. I'll let
28 you go there. This is a yes or no. Were there regulations

1 post 2005, promulgated by the State Department of Education
2 that said you can give these insulin shots in these
3 situations?

4 MS. JOHANSEN: There is the Legal Advisory, absent
5 the Legal Advisory.

6 THE COURT: I am looking at the state of the law
7 before the Legal Advisory. My understanding of the state
8 of law is you folks actually agreed at that time. You may
9 not like the law, but the law was nursing folks through the
10 Board can't do it. Department of Education through policy
11 advisors can't do it, and then obviously went to court and
12 that's what brings us here.

13 MS. JOHANSEN: The Department of Education said
14 under state law perhaps not expressly authorized. It
15 didn't say can't do it. It said not expressly authorized.
16 There is a difference.

17 THE COURT: That's what I want you to show me
18 because that one says you can't do it.

19 MS. JOHANSEN: This was withdrawn, your Honor.

20 MS. CUMMINGS: I am Larisa Cummings with
21 Disabilities Rights Education.

22 THE COURT: Thank you.

23 MS. CUMMINGS: The 5 CCR 600 regs were promulgated
24 in 2003. They expressly contemplate administration of
25 medications by unlicensed school personnel, that's
26 following on the authority of Education Code 49423.

27 THE COURT: Right.

28 MS. CUMMINGS: At 610, the Department was authorized

1 to issue further nonbinding guidance on the subject and it
2 did so with this program Advisory in 2005. What that is is
3 a recommendation.

4 THE COURT: Is it? This one I referred to?

5 MS. CUMMINGS: What it is is a recommendation that
6 unlicensed personnel not administer medication by
7 injections and others as well. It's nonbinding guidance.
8 It is not a regulation. It is a recommendation and at the
9 very end of it, the very end of that Program Advisory, your
10 Honor, you'll see the acknowledgement that notwithstanding
11 any of these recommendations or state law students with
12 Section 504 plans must have those services described in
13 those plans. Nothing shall get in the way of that.

14 There has been nothing since then. But there is a
15 big distinction to be made between the Program Advisory of
16 '05, and the prior regulations that have the force of law.

17 THE COURT: And then the position on this -- thank
18 you, Ms. Cummings that comment was helpful, would be that
19 this, this ripcord of 504 ADA compliance would in effect
20 preempt the state law and now we have proof of it because
21 of this Advisory Opinion. That's a grossly simplistic.

22 MS. CUMMINGS: That there is also acknowledged at
23 611.

24 THE COURT: Right. Also acknowledged -- I didn't
25 understand that last.

26 MS. CUMMINGS: 5 CCR 611 regulation promulgated in
27 2003, also states explicitly.

28 THE COURT: Predates it, but it's the same thing.

1 I guess, you would agree with it. In a way this is
2 the core issue in the lawsuit.

3 This is with regard to their position, you disagree?

4 MS. CONES: I disagree.

5 THE COURT: What do you disagree with?

6 MS. CONES: First of all, I disagree that the
7 Program Advisory's last paragraph which states that nothing
8 shall get in the way of the 504 plan is indicated to be in
9 some way a permission for unlicensed personnel to
10 administer insulin in school. To the contrary -- your
11 Honor --

12 THE COURT: Let me read the paragraph. This is one
13 of those things I can look in the horse's mouth and count
14 the teeth.

15 MS. CONES: Certainly, your Honor. While we're
16 obtaining that --

17 THE COURT: Who said that? It was the Pope, right?
18 Pope -- I can remember his name. But there is a big fight
19 about whether or not how many teeth were in the horse's
20 mouth.

21 Well, go look in the horse's mouth and count them.
22 And then Joyce Carey picked up that quote in a novel,
23 right? "Horse's mouth." What was the name of it? I have
24 a room full of scholars.

25 MS. CONES: "Straight from the horse's mouth."

26 THE COURT: "Straight from the horse's mouth." I
27 think that's it. Okay. What paragraph are we talking
28 about here? Let's see.

1 MS. CUMMINGS: The very end.

2 THE COURT: Can you help me here? I think I went
3 too far. Is this the -- maybe you could give me --

4 MR. WOOD: May I approach?

5 THE COURT: Yes, sir, of course. Let me hand this
6 back to you. I should have asked you to do that first.

7 MS. CONES: Yes, your Honor, it is in section 610 of
8 the Program Advisory from 2005. And I believe it is on
9 page 26 of 32, if that helps you, Mr. Wood.

10 MR. WOOD: That helps a lot.

11 THE COURT: Why don't you just bring what you have
12 there. Bring it up. Do you have it in front of you? If
13 you just show it to one another. I'll look at it. The
14 pagination and the order of the pages is weird in the copy,
15 it gets changed around.

16 MS. CONES: Specifically, your Honor, at
17 subparagraph D.

18 THE COURT: Let me take a look at it.

19 MS. CONES: If may I approach.

20 THE COURT: Would you show it to Mr. Wood.

21 MR. WOOD: I have Roman 15 on page 32.

22 THE COURT: Go over and show.

23 MR. WOOD: The teeth, huh?

24 THE COURT: Yeah.

25 MS. CONES: Very well.

26 THE COURT: Okay. I don't want to spend too much on
27 time on this. I think it is a side issue, but I think it
28 is helpful by way of background.

1 MR. WOOD: Actually. It is key issue, your Honor.

2 THE COURT: Well, the substance of it is a key
3 issue. The presence of this reference in the regulation
4 previously, I am not sure is; is that right? I think so.
5 Anyway let me read it.

6 (Brief pause.)

7 THE COURT: It says what it says. I am not going to
8 spend anymore time with it.

9 MS. CONES: If I may add one more thing, your Honor.
10 We don't take issue with this statement. The issue is not
11 whether the students are entitled to receive these
12 services. It's from whom they will receive them. So, we
13 don't take any issue with this section.

14 MR. WOOD: That's a key concession. And it's a
15 concession that drove the settlement of the case, your
16 Honor, and it is a concession that every child with
17 diabetes in the State of California not only has state
18 rights but fairly protected rights as well.

19 THE COURT: Well, I wasn't going to go there next,
20 but seeing how we're there, I mean the federal law requires
21 that this service be provided by appropriate personnel.
22 Fair statement?

23 MR. WOOD: Correct, your Honor.

24 THE COURT: Does the State of California have the
25 authority to determine who the appropriate personnel are?

26 MR. WOOD: To the extent it is consistent with
27 federal law, yes.

28 THE COURT: And in this instance if they provide

1 appropriate personnel by category and then don't fund them,
2 your position is that sufficient people, your position is
3 they are in violation of federal law.

4 MR. WOOD: That's correct, your Honor.

5 THE COURT: But are they in violation with the
6 provision of limiting the services that individual
7 personnel can provide? Isn't that two different things? I
8 didn't word that clearly.

9 MR. WOOD: I think that they would also agree in
10 reading their papers that federal law compels the seven
11 categories that are in the settlement as providers. So the
12 only issue here is whether or not the eighth category of
13 the Advisory is consistent with federal law in guaranteeing
14 the right of the children with diabetes when the first
15 seven are not available.

16 THE COURT: Isn't that authority that the State of
17 California exercises in terms of what people can provide
18 this service?

19 MR. WOOD: Again, only under the loss of preemption.
20 Only to the extent that it is consistent with the federal
21 rights of these children.

22 THE COURT: But, if they've identified a number of
23 mechanisms and number of individuals that can provide that
24 service, they've exercised their responsibility of
25 identifying who can provide the service, that's not the
26 federal law can't say, oh, well, it's got to be a tenured
27 employee, or it has to be a person with this level of
28 training, or it has got to be a person who is not a

1 volunteer but rather paid for this service, that's beyond
2 the scope of the federal authority.

3 MR. WOOD: That's correct, your Honor. And all --

4 THE COURT: The remedy here under the federal law is
5 to go back to -- I am just saying this out loud. Go back
6 to Judge Chesney and say if there is a violation in that
7 context, you ought to do what the magistrate is doing with
8 regard to the prison, order the State of California to fund
9 it.

10 MR. WOOD: Your Honor, the lawsuit was filed in this
11 court and defended in this court.

12 THE COURT: Right. That issue isn't before me. Let
13 me take a step back because I asked you a lot of questions
14 in a hurry there.

15 If there is an obligation to fund this service and I
16 think there probably is, but you know that issue isn't
17 before me. There may well be a lawsuit that mandates the
18 State of California to fund this service in order to meet
19 the requirements of the ADA and 504.

20 But that's a different question as to whether or not
21 the federal government can mandate specific categories of
22 individuals to provide this service.

23 Let me just pause and take your time with this
24 because there are actually two keys issues and this is one
25 of them.

26 MR. WOOD: Fundamentally the federal law requires
27 that every school child in this state be provided a free
28 appropriate public education. That federal law has been

1 adopted and put into statute by California, the same rights
2 are guaranteed by California as well.

3 To the extent that children with diabetes have a
4 disability, they are entitled to protection of federal law
5 as well as state law for a free appropriate public
6 education. State -- the federal law as well as state law
7 says that that must be provided by the schools in the
8 school districts.

9 THE COURT: Right.

10 MR. WOOD: Children with diabetes, it is a given
11 they acknowledge.

12 THE COURT: Can I just pause here to tell you
13 something.

14 MR. WOOD: Sure.

15 THE COURT: I've had a number of these lawsuits
16 where I order school districts all over the state to do
17 this. The ADA requires that you do this and sometimes the
18 State of California and you got to do it.

19 MR. WOOD: Right.

20 THE COURT: That's the law, I'm sorry. But that
21 isn't the lawsuit here.

22 MR. WOOD: No. The lawsuit is really -- it is just
23 about the eighth category, that in those situations when
24 children are denied the administration of insulin because
25 of the unavailability of the first seven categories, is
26 there a way that children with diabetes can be provided
27 this federal right and state right.

28 THE COURT: The eighth category exists in federal

1 law as an option, is that a fair statement?

2 MR. WOOD: Yes. And also it is consistent --

3 THE COURT: Just help me with this: How do you get
4 that option applied? In other words, the State of
5 California could properly fund the nurses, for example, and
6 then obviously that wouldn't be mandatory because they
7 would be providing the services.

8 MR. WOOD: That's correct. But what the CDE in the
9 settlement does is to acknowledge, frankly, the reality of
10 the unavailability of nurses throughout the state.

11 THE COURT: Um-um.

12 MR. WOOD: And that was a problem that drove us to
13 file the lawsuit, that children with diabetes were not
14 receiving care under the interpretation of the BRN, but
15 only license. But it was our position -- it was our
16 position at the time we sued the Department of Education
17 the time we settled the case is California state law does
18 authorize trained individuals within the school as an
19 option to administer insulin in strict in accordance with
20 the physician's orders.

21 THE COURT: Or in an emergency.

22 MR. WOOD: Or in an emergency. But the position is
23 that the eighth category is permitted and required by
24 federal and state law as a matter of the children's rights
25 and is also permitted by an interpretation of California
26 state law regarding the administration of medications.

27 THE COURT: Um-um.

28 MR. WOOD: It is not inconsistent but totally

1 consistent with every interpretation of state law. The --
2 if I might just address the Nurse Practice Act, I don't
3 know if you want to go there yet.

4 THE COURT: I want to hold that off.

5 MR. WOOD: Okay.

6 THE COURT: Let me hear from this side.

7 MS. CONES: Your Honor, you identified exactly the
8 salient issues in this case.

9 THE COURT: They always say that when I ask the
10 question that supports their position. Either that or,
11 Judge, you are really brilliant. I hear that once in
12 awhile too. Let me ask the question for these folks. You
13 have that opportunity in a minute. Okay.

14 MS. CONES: Your Honor, the fact that federal law
15 entitles students who are insulin dependent to receive
16 insulin in schools, does not create authority for
17 unlicensed personnel to administer that insulin simply
18 because a licensed personnel happens not to be in the
19 school at that time.

20 The federal law is not prescriptive. It is true
21 indeed the federal law does not preclude unlicensed
22 personnel from administering insulin; however, we disagree
23 with the defendants, as I will refer to them collectively
24 in this case, that state law would permit that.

25 In fact, it does not. The Nursing Practice Act
26 specifically precludes that and the Education Code does not
27 contain any exception that would allow unlicensed personnel
28 to administer insulin in the schools in other than

1 emergencies as that term has been defined under the Nursing
2 Practice Act.

3 What has happened in this situation is that nurses
4 are unavailable in schools in large part whether a nursing
5 shortage exists or not, your Honor, because there is no
6 state law that requires schools to hire licensed personnel.
7 We would argue, your Honor, that they sought the wrong
8 relief in Federal Court. They should have sought to have
9 the State of California fund what is required under state
10 law and that is licensed personnel to administer insulin to
11 these students.

12 We're not trying to put a roadblock up to prevent
13 them from getting services. We want to make sure that they
14 are entitled to the level of services that California law
15 guarantees to them and that is administration of insulin by
16 licensed personnel.

17 THE COURT: Let me get over here and I will give you
18 the last word on this. I am deliberately not asking
19 questions for a couple minutes because I know you all want
20 to speak on this. Then we'll move to the statute.

21 MR. WOOD: Fundamentally California state law, your
22 Honor, can't create a system that prevents the
23 administration of insulin or the provision of fair
24 appropriate public -- free appropriate public education to
25 school children, they cannot setup a system that has that
26 affect. Second --

27 THE COURT: Can I -- they've setup a system that has
28 reasonable alternatives. They just don't fund it. Is that

1 untrue statement? Or false? I mean, I think that's --
2 everyone is shaking their head different ways, I shouldn't
3 be looking at the heads.

4 MR. WOOD: I don't do that. We'll get a bobbing
5 head one way or the other here. It's blood from a turnip,
6 that's the phrase that comes to mind here.

7 We are looking at the reality first driven by the
8 federal rights of these children and state rights of these
9 children. Second, the undisputed shortage of nurses.
10 Third, the children with diabetes in the school systems are
11 not getting the care they need and it is detrimentally
12 affecting their education and their health, and if they are
13 right, the only way their rights can be protected is to
14 pour more money into the school systems and it is not a
15 question -- the question that we brought on the federal
16 lawsuit is not a question of funding, your Honor.

17 It's finding an alternative given the very real
18 situation the California schools take. We would love to
19 have a school nurse in every school.

20 It is not going to happen. Every effort that the
21 school nurses have made to fund it from tobacco money and
22 everything else has failed. We are faced with reality and
23 have been faced with the reality for more than a year and a
24 half since we settled this case.

25 The children in California schools are not getting
26 the insulin that has been prescribed by their doctors.
27 What's the solution? The solution has come up with a
28 system where you train someone appropriately just as the

1 law recognizes that you can train foster parents to
2 administer insulin. To train someone appropriately trained
3 by a nurse to administer insulin.

4 THE COURT: Can I just pause right here? Because
5 this argument is a very persuasive public policy argument.
6 But I'm a Judge, I am trying to translate that to the law
7 in terms of what I can do to enforce the law. And so it's,
8 you know, if I was in the legislature you got my vote, but
9 that doesn't, that doesn't answer what to do within the
10 scope of the law as it exists. I just wanted to -- if I
11 could move you.

12 MS. JOHANSEN: Your Honor, if I may, Mr. Wood has
13 yielded the floor to me very graciously. And as a Judge,
14 the Court's obligation under well-established case law is
15 to try to harmonize the state statute with the federal. It
16 is not a matter of public policy.

17 It's a question of has the state put up a roadblock
18 that effectively prevents the implementation of the federal
19 law for these students and the question then is: What is
20 that roadblock and how clear is it in state law? And
21 that's where we go to the question of 2725 (b).

22 THE COURT: This is a good transition point.

23 MS. JOHANSEN: Look at the state law and the state
24 law is 2725 (b) and a nursing license is required if the
25 act requires a substantial amount of scientific knowledge
26 and technical skill. It is conjunctive. It is not
27 disjunctive.

28 THE COURT: But then the Nursing Board through

1 policy promulgations makes it clear that unlicensed
2 personnel are not to give injections but for these kind of
3 exceptions you and I have just been talking about.

4 MS. JOHANSEN: If I may, your Honor, the Nursing
5 Board is not the state legislature. The Nursing Board has
6 not even promulgated that particular Advisory or whatever
7 you want to call it as a regulation. The Nursing Board has
8 simply said it disagrees with that interpretation of the
9 state law. And all the Court --

10 THE COURT: That is not attacked as an underground
11 regulation in this lawsuit. I actually looked for that
12 pleading. It wasn't raised. I don't want to move away
13 from this. I want to hear you out.

14 I don't want to move away from this issue. There is
15 no dispute that they've issued a policy, that unlicensed
16 personnel cannot give injection in this kind of context
17 we've talked about here; is that a fair statement?

18 MS. JOHANSEN: When you look at that particular --
19 we'll go back to it. The, the policy talks about people
20 who are expressly authorized and they recommend against it.
21 Okay.

22 THE COURT: I thought it was stronger than that. Do
23 one of you have the policy? Let me take a look at it. I
24 read it earlier.

25 MS. CONES: Yes, your Honor, we'll get it to the
26 Court's attention. Really the Court does not even need to
27 go that far. It is explicitly stated in the statute.

28 THE COURT: I don't want to go there for a second.

1 Let me just take a moment and I need a 30 second break.
2 You can find that policy.

3 MS. CONES: Thank you, your Honor, we will.

4 THE COURT: Thank you.

5 (Brief pause.)

6 THE COURT: Thank you for your patience. It wasn't
7 the Pope, it was Noveshia, arguments were ensuing between
8 the priest about how many teeth are in the horse's mouth,
9 other people in the church. And Noveshia's brother said
10 why don't we go down to the stable and look in the mouth of
11 a horse. I promoted it.

12 MR. WOOD: Extract blood from a turnip.

13 THE COURT: Yes.

14 MS. JOHANSEN: I believe, your Honor, we were
15 looking at this particular BRN Advisory and what the
16 Advisory says at page 2 is that administrative medications
17 including insulin is a nursing function that may not be
18 performed by an unlicensed person unless expressly
19 authorized by statute.

20 Now, they don't go on to talk about whether section
21 49423 of the Education Code expressly authorizes that or
22 whether the regs interpret that.

23 THE COURT: That's a separate argument.

24 MS. JOHANSEN: It is a separate argument. We
25 disagree that it is a nursing function within the meaning
26 of 2725 (b). And the fact that the legislature itself --

27 THE COURT: Does this policy promulgation have any
28 weight from your perspective?

1 MS. JOHANSEN: No. Your Honor, if that's a
2 regulation; ours is a regulation.

3 THE COURT: Well, there are things that the Board
4 can promulgate regulations. They Promulgate policy, what
5 have you. Generally the case law is you give them
6 deference in the issuance of such statements, obviously
7 regulations are higher up the food chain.

8 MS. JOHANSEN: It is a statement of BRN's position
9 and, as I mentioned earlier, the statement also says until
10 the issue is resolved, and that's the job of this Court, I
11 am afraid.

12 THE COURT: Before I go to the Education Code, did
13 you have anything else on this policy? Do you think it has
14 any force and effect?

15 MS. CONES: It is entitled to deference as the
16 Board's interpretation of its own statute and regulations,
17 your Honor, and it supports the notion that unlicensed
18 personnel cannot administer insulin in school.

19 THE COURT: History is not a good gauge of always
20 where the truth is. I mean, after all you do have to look
21 outside the scriptures to find out, for example, how many
22 teeth are in the horse's mouth. But it is clear when you
23 look at history of 2725, it's been -- there has been
24 statutory exceptions that have been sought and received in
25 order to avoid the interpretations which are urged upon
26 made by the nursing folks. Would that be a fair statement?

27 MS. JOHANSEN: I think what you see with 2725 was an
28 evolving kind of approach to nursing functions, and again

1 this question of the pivotal language is substantial amount
2 of scientific knowledge and technical skill.

3 And the legislature by saying that foster parents or
4 their designees or unrelated extended family members can
5 administer insulin to foster children, has very clearly
6 stated then that the administration of insulin does not
7 require that.

8 THE COURT: But that's specific statutory exceptions
9 for which there's specific public policy to support.
10 Foster parents, for example, in adopting foster children
11 and providing that care.

12 My point is that seeking approving, signing, those
13 type of laws is consistent with the interpretation that you
14 cannot do that without a statutory change.

15 MS. JOHANSEN: I think not, your Honor. In the
16 sense that it's a recognition that it can and should be
17 done by foster parents and then you have 49423, which is a
18 recognition that it can and must be done within the school
19 setting.

20 THE COURT: All right. We'll get to the Education
21 Code in a second.

22 Anything else on this issue?

23 MS. CONES: Yes, your Honor.

24 THE COURT: I am on 2725 here really.

25 MS. CONES: Yes, your Honor. And all of the
26 exceptions to 2725 have been adopted through the
27 appropriate legislative channels and in the event that the
28 respondents and American Diabetes Association wanted to

1 create an exception to allow unlicensed personnel to
2 administer insulin in schools, they should have gone
3 through the appropriate legislative process to do that as
4 well.

5 THE COURT: All right. I'll give you the last word.
6 I know you have been ooching to talk, I am sorry. I don't
7 want you to move to the Education Code. That's a separate.
8 In my mind I am treating that as a separate issue.

9 Go ahead.

10 MR. WOOD: Just to address the point about piecemeal
11 legislation. We have to view this as continuum where we
12 began with this continuum was everybody acknowledging with
13 49423, ultimately or the statute vetoed by Governor Davis.
14 It was appropriate. It was safe. It was effective and it
15 could be done under state law and federal law and indeed at
16 the point AB 481 was pending to create 49423.1. In that
17 continuum, CSNO said that it was safe and appropriate under
18 state law. Nothing has changed.

19 THE COURT: I am sorry, CSNO is?

20 MR. WOOD: CSNO in the response to the legislative
21 history.

22 THE COURT: Who is CSNO?

23 MR. WOOD: California state --

24 MS. JOHANSEN: School nurses.

25 THE COURT: I am going to go back to this. You and
26 I are arm wrestling here.

27 MR. WOOD: Okay.

28 THE COURT: I don't have that authority. I will

1 just tell you right now, I think your dead wrong on the
2 policy. I wasn't joking with him. If that bill was before
3 me, I'd sign it. It would be law because it makes sense to
4 me. But I am not the legislature and so the fact that as a
5 matter of public policy at some point previously they
6 acceded that they wrong is intriguing and fun, but it
7 doesn't address how I interpret the statutes, which I have
8 to do and in this instance between the state and the
9 federal and between these two state statutory themes.

10 So I won't beat you up, but that's what is in the
11 back of my mind.

12 MR. WOOD: I will put my arm down. I am not going
13 to arm wrestle.

14 MS. CUMMINGS: Can I --

15 THE COURT: Yes.

16 MS. CUMMINGS: In order to decide that
17 administration insulin by unlicensed personnel violates the
18 Nurse Practice Act, you would have to decide it involves
19 substantial knowledge and technical skill. The only
20 evidence before you of that submitted by petitioners is two
21 declarations provided by nurses who are not in any way
22 experts in diabetes management.

23 THE COURT: And the policy directive from the
24 Nursing Board which is --

25 MS. CUMMINGS: Something you should disregard which
26 we have gone over. We can go over it again. It was an ad
27 hoc reaction to the filing of this litigation.

28 One month after the NA filed the lawsuit did not

1 involve any notice in comment, and expressly recognizes
2 that this Court must determine what's authorized by
3 statute.

4 You need to be cautioned -- I am sorry, about that
5 Advisory. If it is an Advisory and recognize also that
6 there is a broad consensus in the diabetes community that
7 it is not a matter of substantial knowledge and technical
8 skill to administer insulin.

9 You have overwhelming evidence in the record to that
10 effect that has not been controverted whatsoever. For that
11 reason, we say there is no violation here of any state law
12 and there is an express authorization under 49423.

13 MS. CONES: Your Honor.

14 THE COURT: I am going to cut you off. Because I
15 want to go to the Education Code and hear Ms. Johansen on
16 this. You can speak on it too, but I just want to move to
17 that area.

18 MR. WOOD: Just one word.

19 THE COURT: Okay.

20 MR. WOOD: And you do have the authority to find
21 that unlicensed appropriately trained individuals can under
22 the law administer insulin and that the provision 8 is
23 consistent with law and that is as a matter of federal
24 preemption under the law of Crowder.

25 THE COURT: And then I think I do have to let you
26 respond on this point and then I'm going to come to you on
27 education.

28 I want to get off of this and move to the education

1 statute. Thank you. I cut you off before and I'll let you
2 speak now on this 2725, if you have anything else.

3 MS. CONES: Your Honor, first of all, regardless of
4 the battle of the declarations that have been filed in this
5 case, none of the experts make the law of this state and in
6 the event that they wanted to create a statutory exception,
7 they needed to go through the appropriate legislative
8 process.

9 The notice and comment period as required under the
10 APA and even if you accept every single word of what
11 opposition just said as true, it does not allow them to
12 unilaterally promulgate a regulation in violation of the
13 APA. So the truth of the matter is that the evidence
14 really doesn't matter.

15 I understand that the Court finds it as a policy
16 matter raised in their favor.

17 THE COURT: I am going cut you off. I don't need to
18 hear arguments on APA. That's one area I understood based
19 on the pleadings.

20 Let me go to the Education Code.

21 MS. JOHANSEN: Your Honor, the 49423 issue
22 apparently comes down to the question of whether "assist"
23 means administer. That seems to be the major dispute here
24 because 49423 very clearly says that students who need
25 medication at school may be assisted by a school nurse or
26 other designated school personnel under certain conditions,
27 and then it lays out what those conditions are to protect
28 the student's health through doctor's order and written

1 statement through the parents. And it has to be a
2 volunteer.

3 So the question is then what does 49423 mean?
4 Insulin is clearly a medication. 49423 contains no
5 exception. It does not say medication that requires any
6 kind of subcutaneous injection. It does not say medication
7 that requires something else. It says medication. So
8 there is no limitation there.

9 THE COURT: Can I just -- there is a big argument, a
10 lot of pleadings on this. When I just read it, it was
11 like, oh, my clerk assists me on occasion with taking an
12 aspirin on the bench. She goes and gets it. She brings it
13 to me. She puts it in front of me with a glass of water.
14 I administer it to myself.

15 MS. JOHANSEN: Your Honor, if I may and here's
16 something that we didn't emphasize in our papers and I
17 would like to bring it the Court's attention.

18 THE COURT: Be sure and share it.

19 MS. JOHANSEN: Yes. It is 49423.6. May I approach,
20 your Honor?

21 THE COURT: That's all right. Because I marked it
22 and it is in front of me.

23 MS. JOHANSEN: Right. In 49423.6 the legislature
24 was telling the State Department of Education and the State
25 Board that they need to adopt regulations. And what they
26 said in the statute is on or before June 15th, 2001, those
27 two agencies shall adopt regulations regarding the
28 administration of medication in the public schools pursuant

1 to section 49423.

2 They couldn't be clearer, your Honor. They are
3 saying administration under 49423 that that's what they
4 meant by the word "assist," that's what they wanted our
5 Department and the State Board to adopt regulations to do.

6 So, this in my view very clearly is legislative
7 intent as to what the meaning of the word "assist" in 49423
8 is.

9 THE COURT: If the position of the Nursing Board
10 either by policy or subsequent regulation is that the
11 medication cannot be administered in this context, and if
12 the regulations or policy of the State Department of
13 Education is that it can be, who has got the bat?

14 MS. JOHANSEN: Who has got?

15 THE COURT: Who has the bat?

16 MS. JOHANSEN: We do and that's because this is both
17 later enacted and more specific. What we have here is the
18 legislature telling the State Department of Education and
19 the State Board of Education to develop regulations about
20 who, that's the question before the Court who can
21 administer medication to children in public schools, and
22 what it is saying is that there are two categories.

23 There are nurses and other designated school
24 personnel and the safety valve that the legislature wrote
25 into 49423 is that it has to be pursuant to the doctor's
26 orders and it has to be at the request of the parents.

27 THE COURT: Has the Board of -- excuse me, State
28 Department of Education issued anything?

1 MS. JOHANSEN: Yes.

2 THE COURT: You are talking about the Advisory?

3 MS. JOHANSEN: No, no. The regulations that were
4 issued are 5 CCR. 600 et. seq.

5 THE COURT: When were those issued?

6 MS. JOHANSEN: 2003.

7 THE COURT: And those are the ones you showed me
8 before about the 504 language?

9 MS. JOHANSEN: Yes, in 611 I believe talks about
10 504.

11 THE COURT: Do they say -- do those regulations say
12 that unlicensed personnel appropriately trained can
13 administer insulin to students?

14 MS. JOHANSEN: I am sorry, your Honor, they do not
15 specifically address insulin, because 49423 is addressed to
16 all different types of medication.

17 THE COURT: What do they say?

18 MS. JOHANSEN: The statute.

19 THE COURT: Not the statute. I want the regulation.
20 This is how I am understanding your argument. Judge, we
21 have authority subsequent to June 15th, 2001, to promulgate
22 regulations that control in this area. I'm not sure that's
23 true, but assuming it is true, have the regulations been
24 issued? Yes. Let me see them.

25 MS. JOHANSEN: Okay. And here the regulation.

26 THE COURT: Let me look at them. I am sorry.
27 Reading to me doesn't do it. Would you share.

28 MS. CONES: What section are you referring to?

1 MS. JOHANSEN: 601.

2 MS. CONES: Very well, your Honor. I am happy to
3 address 601.

4 THE COURT: Let me read it and I will come back to
5 you.

6 MS. CONES: Very well. Thank you.

7 MR. WOOD: Can I approach, your Honor?

8 THE COURT: Yes, sir, please do.

9 MS. JOHANSEN: Your Honor, 601 is the definition
10 sections, your Honor, and it defines medication as a
11 prescription medication or an over-the-counter.

12 (Brief pause.)

13 THE COURT: You think this gives these folks
14 authority to administer a full range of medications by
15 injections to pupils that have been medically prescribed?

16 MS. JOHANSEN: I think pursuant to doctor's orders
17 and at the request of the parent and if they have been
18 properly trained, the answer is yes.

19 THE COURT: Where does it include those criteria?

20 MS. JOHANSEN: Well, that is in the statute, your
21 Honor. And then 60.

22 THE COURT: Are you going to the statute back to
23 2725 to get that language?

24 MS. JOHANSEN: No, 49423, your Honor.

25 THE COURT: Where is that?

26 MS. JOHANSEN: That is Education Code 49423.

27 THE COURT: Let me take a second to go back and look
28 at that. Just a second.

1 (Brief pause.)

2 THE COURT: Okay. Let me hear from the other side.

3 MR. WOOD: Just one.

4 THE COURT: No, I am going to ask you because you
5 are double-teaming this poor lady. I am not hearing enough
6 from her and it is not fair.

7 MR. WOOD: How about one sentence?

8 THE COURT: After I hear from her.

9 MS. CONES: Education Code 49423 is silent as to the
10 type of medication that licensed personnel and other
11 designated school personnel have the authority to
12 administer.

13 So it is necessary to look at the implementing
14 regulations for definitions of medication and they too are
15 silent on the issue of insulin.

16 However, what I need to direct the Court's attention
17 to is section 601 (e) which defines designated school
18 personnel. And what opposition has failed to, to tell this
19 Court is that the term designated school personnel is not
20 synonymous with unlicensed personnel.

21 Designated school personnel is defined under the
22 regs implemented by CDE as somebody who not only consents
23 to administer the medication, but who has legal authority
24 to do so who may legally administer the medication and then
25 if you take a look at section 604.

26 It permits those same people to administer or
27 otherwise assist people in the administration of medication
28 as allowed by law.

1 As we have informed the Court previously, there is
2 no authority under the law for unlicensed personnel to
3 administer insulin in schools and the term designated
4 school employee or school personnel is not synonymous with
5 unlicensed personnel.

6 THE COURT: Let me just reread this. I have the
7 benefit of that argument.

8 (Brief pause.)

9 MS. CONES: If they would like me to define.

10 THE COURT: Excuse me, I can't read, I apologize.

11 (Brief pause.)

12 THE COURT: Okay. I think I understand your
13 argument.

14 Anything else?

15 MS. CONES: No.

16 THE COURT: You two are going to have to talk. One
17 of you are going to speak. I have been unfair to the
18 petitioner here. I'll hear from one of you, but I can't
19 hear from two or three at a time. It is not -- go ahead,
20 yes, sir.

21 MR. WOOD: Yes, your Honor. There is authority for
22 the administration of the insulin by appropriately trained
23 unlicensed individuals 49423. We're going to rely on the
24 regulations.

25 They have to rely on all the regulations and all the
26 language of the regulations which uses, administers and
27 assists synonymously throughout the regulations. There is
28 no distinction. There is no difference.

1 Second, the single subject rule on statutory
2 interpretation, I think we cited the San Joaquin helicopter
3 case. The name, the title which is very useful in deciding
4 this case who can administer insulin and who can't. The
5 title of 49423 is the administration, administration of
6 prescribed medications to pupils.

7 The authority that CDE relied upon in resolving this
8 case was 49423, that as well as the regulations that
9 expressly permits appropriate trained individuals to
10 administer and assist, same words insulin to school
11 children.

12 MPA is not inconsistent with that.

13 THE COURT: Right. But it is two different
14 functions.

15 MR. WOOD: Not, not --

16 THE COURT: Excuse me, it is two different -- you
17 can assist in administration and you can administer. And
18 the line is where it -- you put it inside the person's
19 mouth or body.

20 If you look, for example, in 49423 there are
21 provisions with regard to self-administration. It is not
22 inappropriately titled, assisting is a vehicle or manner by
23 which administration can be assisted.

24 MR. WOOD: That's correct.

25 THE COURT: Right.

26 MR. WOOD: But the goal of the legislature in
27 enacting 49423 as is detailed earlier is this continuum to
28 get care to school children. The regulations use

1 administer and assist synonymously. The only fair reading
2 in 49423 is to read it synonymously; otherwise, nurses
3 themselves would not be able to administer medications to
4 students. It would only be able to assist them.

5 THE COURT: All right.

6 MS. CONES: Your Honor, in fact.

7 THE COURT: Excuse me, did I get everything over
8 here?

9 MS. CONES: Yes.

10 THE COURT: Yes, ma'am.

11 MS. CONES: Your Honor, in fact, that's exactly what
12 was intended was to limit what could be done in terms of
13 administering medication in the school setting and the
14 California Department of Education acknowledged such in its
15 2006, Program Advisory where it specifically addressed this
16 issue and stated that the words "assist and administer" do
17 not have the same meaning.

18 In fact, they said that section 49423 permits
19 assistance. The terms "assist" and "administer" are
20 plainly not synonymous.

21 THE COURT: I am going to move you off of that only
22 because that was argued and I understood that in the
23 pleadings.

24 MS. CONES: Very well, your Honor.

25 MS. CUMMINGS: Your Honor, if I may.

26 THE COURT: Let me just have one second. I am going
27 to reread this having the benefit of the argument.

28 (Brief pause.)

1 THE COURT: Let me ask this side. What regulations
2 would you envisage would be promulgated pursuant to 49423.6
3 regarding the administration of medication?

4 MS. CONES: To permit insulin to be administered by
5 unlicensed personnel in school, is that your question, your
6 Honor?

7 THE COURT: No. My question is: What regulations
8 do you envisage would be promulgated as a result of the
9 authority that the State Department of Education is given
10 pursuant to 49423.6?

11 MS. CONES: They promulgated the regulations that
12 section 600 et. seq. which do allow for the administration
13 of medication to children in schools by licensed personnel
14 or other designated school employees.

15 THE COURT: These are the regulations I looked at
16 earlier the same criteria, is that right? I just want to
17 pause here.

18 MS. JOHANSEN: Yes, 5 CCR section 600.

19 MS. CONES: They are, your Honor. However, those
20 regulations plainly do not give unlicensed personnel the
21 authority to administer insulin. They talk about
22 designated school personnel.

23 THE COURT: Let me go over to this side of the room.
24 Let me tell you what bothers me about this argument. I
25 want to tell you just so you can respond to it.

26 When I take a step back from this and I look at the
27 statutory matrix, I say hold it. We've got a law here 2725
28 that describes the scope of practice for nursing functions.

1 If you -- let me just be blunt, if you lose the
2 argument that that law has it has been effectively applied
3 through policy and at least interpreted in a sense by
4 subsequent legislative action by providing statutory
5 exceptions to avoid the interpretation that you cannot give
6 injections of this manner, this law really occupies who can
7 do it.

8 This is what this law is about. And it's the
9 Nursing Board that has expertise and who can do it, is
10 given the authority in this area.

11 And then I look over here in the education thing and
12 I look at, oh, but they have given the Department of
13 Education some authority too here, and there are all kinds
14 of things. This is the answer I was expecting and in part
15 I got. That you can promulgate with regard to how
16 medications are administered in the school.

17 But this is with regard to how it's operated in the
18 school, all kinds of issues associated therewith. And they
19 can do, I think, and have broad authority to the extent
20 that it is not inconsistent with 2725, that the argument --
21 I thought she was making this argument and she didn't. So
22 I am making it now because I am thinking it. The argument
23 is really upside down from your position, that the specific
24 statutory authority on scope of practice is found in 2725,
25 and the general authority about the administration of this
26 program is found in 49423 et seq.

27 I want to be quiet. As opposed to the other issues
28 we've been talking here, I probably let you go too long.

1 This is kind of what I looked at and said, oh, this makes
2 sense. I mean, it may not be right, but it makes sense in
3 terms of the statutory matrix. Let me hear you out.

4 MS. JOHANSEN: All right.

5 THE COURT: You, of course, adopt my argument.

6 MS. CONES: That is correct, your Honor. It is
7 clear to us that 2725 is more specific.

8 MS. JOHANSEN: Your Honor, 2725 is a far more
9 general statute. It doesn't even speak about injections.
10 It doesn't address anything other than this requirement of
11 a substantial amount of scientific knowledge and technical
12 skill.

13 There are broad, broad exceptions in there that we
14 think, you know, delegation and those kind of things family
15 members, that even those would apply this designation that
16 a nurse can delegate responsibilities.

17 It's a general statute that does not set out or even
18 attempt to define what falls within the scope of the
19 nursing license and what falls outside of that.

20 49423 is the legislature's attempt and a much more
21 specific one to ensure that children whose doctors say that
22 they need medication at school -- remember we are talking
23 about in 49423 a very specific standing order from the
24 doctor about the type of medication, the method of
25 delivery, the time it is to be given and the dosage.
26 That's what 49423 requires.

27 Doctors are not going to be prescribing
28 administration of medication by unlicensed people if they

1 feel that it is going to endanger the health of their
2 patients, and on top of that the legislature has said the
3 parent must request it.

4 So this is the legislature's way of saying, we are
5 carving out an exception for other designated school
6 personnel to deliver medication and this is the
7 legislature's way of saying that we are going to make sure
8 that in doing that we comply with the special needs of
9 these students under federal and state law, state
10 disability civil rights laws.

11 You have a parallel provision, your Honor, in
12 49423.5, which deals with physical services as opposed to
13 medication, and in that one the legislature talks about
14 nothing that can impair the rights of students under
15 section 504 plan and that kind of thing.

16 What the legislature is trying very carefully to do
17 here is to write a statute that will ensure that it meets
18 its obligation under federal law. The school districts
19 which are political subdivisions of the state meet their
20 obligations under federal law, and in our view the Court's
21 obligation here is to harmonize any, any competing
22 interpretation of 2725 (b), which we feel isn't really a
23 competing interpretation with what the legislature was
24 intending to do with 49423 and with the obligations that it
25 recognizes that school districts have under federal law.
26 Because otherwise the Court is going to be setting up a
27 conflict between a state law that in our view is quite
28 general and quite ambiguous about what is a nursing

1 function; and the federal law and state civil rights law.
2 That is something that is unnecessary. I think the
3 legislature has tried to provide a way out.

4 THE COURT: I am going to cut you off, because this
5 argument you've made before.

6 MS. JOHANSEN: Thank you.

7 THE COURT: And is there -- I am going to hear you
8 for the last time now, and then I want to hear you for the
9 last time, and then I'm going to close the hearing off.

10 Do I have the people here on the 10:30 lawsuit? It
11 is going to be 11:30 by the time I get to you. Let me tell
12 you why. My court reporter is going to need a break here.
13 And I am going to hear -- as a matter of fact, I think it
14 makes more sense quite honestly to give my court reporter
15 the break now. Because she has been going since 9 a.m.
16 She'll need fifteen minutes, and I am going to come back at
17 eleven and hear your argument.

18 I will try not to interrupt you, because I tend to
19 ask a lot of questions on both sides, hopefully, not too
20 long because we covered things. But I'll give you more
21 leeway than I have and then I'll get to you. I would guess
22 if you could be here, say, at 11:30, because I have one
23 other chore to do unrelated to my calendar this morning.

24 Okay. We're going to take fifteen minutes now for
25 Joe. We'll come back at eleven. I'll hear your final
26 argument without questions as much as I can restrain myself
27 and then we'll conclude the hearing.

28 MS. CONES: Thank you.

1 MS. JOHANSEN: Thank you.

2 MS. BONNINGTON: Thank you.

3 (Brief recess.)

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1 THE COURT: I'd like over here, if you could
2 coordinate your efforts. I am not going to require just
3 one you have speak, but there is something troublesome
4 about having three of you. Maybe you can even apportion
5 time. She is going to talk about this part of it.

6 Let me hear from Ms. Cones. And I am not
7 foreclosing you from letting Ms. Bonnington from speaking
8 either.

9 MS. CONES: Thank you, very much, your Honor. Your
10 Honor, first in response to one of the points made at the
11 end of the argument by Ms. Johansen; there is no conflict
12 between state and federal law in this case.

13 It's really important to understand that the
14 licensing requirements create no barrier to the required
15 services and there are seven other categories of
16 individuals who can provide those services under existing
17 law.

18 So preemption really is not an issue and a Court
19 ruling in favor of the petitioners in this case will not
20 create a conflict as none exists.

21 It's clear, your Honor, that folks are frustrated by
22 the fact that schools have not been providing services to
23 diabetic students and certainly petitioners can, can
24 understand that frustration, and I think it is important to
25 note that we're really interested in achieving the same
26 objective here in ensuring that diabetic students receive
27 the services to which they are entitled.

28 We just want to make sure that they receive them

1 from the person who the law says should be providing them.
2 We think that they are entitled to that high level of
3 service and we hope that the Court will rule in our favor
4 and as a step in ensuring that they receive that level of
5 services.

6 In addition, your Honor, it is clear that the
7 legislature has created express statutory exemption to
8 permit unlicensed personnel to administer medications to
9 children in emergency situations like they did for glucagon
10 where they redefined emergency to include a
11 life-threatening need for glucagon. And there are other
12 exceptions that have been mentioned like those who are
13 parents and families and foster parents others in loco
14 parentis.

15 Unfortunately, no similar statutory exception has
16 been created to permit unlicensed personnel to administer
17 insulin in schools and there has been no redefining of the
18 term "emergency" that would permit them to do so either.

19 In addition, your Honor, even if the Court agrees
20 with the defendant's policy arguments and furthermore even
21 if the Court agrees with defendant's interpretations of
22 both state and federal law, petitioners are nonetheless
23 entitled to writ relief because the Legal Advisory violates
24 the Administrative Procedure Act.

25 It's really an attempt to do what they were unable
26 to do several times through the legislative process and the
27 stakeholder should have been involved and should have been
28 given the opportunity to weigh in on this. Things should

1 have been done through the appropriate administrative
2 process and the fact that it was not really is fatal to the
3 defendant's case. Thank you very much for your time, your
4 Honor.

5 THE COURT: Thank you. And then some combination of
6 folks here.

7 MR. WOOD: Yes, yes, your Honor. Thank you for
8 taking the time to listen to the arguments and review the
9 papers. Despite everybody's best intent, your Honor, there
10 are children who before the federal lawsuit was filed and
11 who today continue to be deprived of the federal rights by
12 not having anybody available to administer insulin.

13 Your Honor, we're not asking you to create policy or
14 to form as a matter of public policy who can and who
15 cannot. Under either interpretation of state law, our
16 belief is that under 49423 appropriately trained
17 individuals can administer insulin.

18 And if petitioners are right that they cannot, then
19 it is petitioner's position and interpretation of state law
20 that, in fact, stands in the way of the accomplishment of
21 the federal rights of these students. Their interpretation
22 prevents the administration of insulin to students who need
23 it throughout the day and the course of the day at
24 unpredictable times.

25 If we had a twelve billion dollar excess in the
26 budget, that would not be enough money to get the care to
27 the students that they need. Are nurses willing to
28 accompany students on field trips? Are they willing to go

1 with them to dances? Are they well to accompany them to
2 any sports activity, extracurricular activity occurs
3 whenever a nurse is not at the office.

4 Your Honor, we filed in the Federal Court with the
5 belief that federal law and the rights of these children
6 that we represented individually as members of the class
7 were entitled to federally protected rights under IDEA and
8 504, and it is our belief today that interpretation of
9 State law remains as a direct impediment to that.

10 There is a conflict of law by its application and
11 interpretation of BRN and the petitioners. And under
12 Crowder, your Honor, you are given the authority as a
13 matter of law to rule as a matter of law that denial of
14 these rights to children by the practicality and the
15 reality of the nursing shortage is depriving them of these
16 rights and we have also as a matter of law given you the
17 opportunity it means through the interpretation of 49423 to
18 reconcile this and to ensure that every student in the
19 state does receive the care that they're entitled to as a
20 matter of federal law.

21 Thank you, your Honor.

22 THE COURT: Thank you, sir.

23 MS. JOHANSEN: Your Honor, may I just --

24 THE COURT: I am sorry. Yes, ma'am, go ahead.

25 MS. JOHANSEN: Thank you. Two points, your Honor.
26 That the first being that the record before the Court is
27 undisputed that there is a nursing shortage in this state.
28 As Mr. Wood said, if the legislature were to take twelve

1 billion dollars, it wouldn't work because there aren't
2 enough nurses. So there is, in fact, a very practical
3 undisputed impediment. Even if you could have a nurse in
4 every school, your Honor, that nurse cannot be everywhere
5 at once. And the problem is that children need their
6 insulin around the same time, before meals, and if the
7 nurse is administering to some other children who might
8 have gotten hurt on the playground or whatever, that nurse
9 needs a back-up, because the child who needs the insulin
10 needs it then.

11 There is no dispute about the need under the medical
12 change in administration and care and treatment of
13 diabetes. There is no dispute here that children need that
14 insulin at school and they need it when, when they are --
15 insulin needs to be injected, they need to have someone
16 there who can inject it.

17 So the problem Mr. Wood has tried to describe, what
18 we have tried to describe to the Court is that the
19 interpretation of 2725 (b) to preclude this is both
20 unnecessary and if the Court were to find that is the only
21 way to interpret 2725 (b), then we are in a situation where
22 the interpretation of the state law directly conflicts with
23 the federal law.

24 The final thing I would urge the Court, you know,
25 the Court has placed a fairly large emphasis on the BRN
26 statement which came out. It is nothing more than a
27 statement, your Honor. It was issued by that agency in the
28 same way that the California Department of Education issues

1 its Program Advisories and it's Legal Advisory here.

2 It's a statement of position. If the BRN felt so
3 strongly about this issue that somehow we were
4 misinterpreting 2725 (b), it should have intervened in this
5 lawsuit. It is not here. It issued a single statement and
6 that is it. So, from our point of view the legislature has
7 made very clear under 49423, and then its interpretation of
8 the 49423.6 of what it means by the word "administer" that
9 this type of administration of medication can be done by
10 other designated school personnel as long as they are
11 properly trained and acting under doctor's orders.

12 MS. CUMMINGS: Your Honor.

13 THE COURT: Yes.

14 MS. CUMMINGS: Thank you.

15 THE COURT: Briefly.

16 MS. CUMMINGS: Very briefly.

17 THE COURT: Just a second. Thank you.

18 MS. CUMMINGS: Thank you. Petitioner's argument
19 devolves into one point essentially and that is parents can
20 do --

21 THE COURT: Can what?

22 MS. CUMMINGS: Parents can do it and in fact that's
23 the reality for the most part. Kids are getting insulin in
24 school right now for the most part are getting it from
25 their parents which is not in their best interest which is
26 not in accordance with their rights.

27 The reason I say it boils down to that is because
28 they say there is no problem with preemption and that there

1 is more than one legally tenable interpretation here,
2 because there is a list of seven.

3 Well, if you look at the list of seven it really
4 boils down to parents can do it. That's not lawful under
5 federal law. There is only one legally tenable
6 interpretation, that's the one that CD issued in the Legal
7 Advisory and that is when licensed personnel are
8 unavailable then other personnel need to be made available.
9 And so there is no conflict with state law to the extent
10 that the CDE recognized very cautiously in the Legal
11 Advisory that licensed personnel are preferred. What it
12 said is you've got to serve these kids and petitioners are
13 straining themselves to say there is a list of seven to try
14 to get out of the fact that you can order the Legal
15 Advisory lawful and not something that needs to be
16 promulgated through the APA because it's the only legally
17 tenable interpretation.

18 Parents should not have to do it. Thank you.

19 THE COURT: Thank you. No, is the answer to your
20 question. Okay. The matter is submitted and I am prepared
21 to rule. I am going to rule that at this time.

22 First, the Court has been forthright and I want to
23 say this again that it seems to me the weight of evidence
24 supports the policy position of the Department of Education
25 and the Intervenor here.

26 There are powerful policy argument, it seems to me,
27 to allow properly trained personnel in the schools to
28 administer injection for insulin to children as we've

1 discussed here, but that's not the question before me.

2 The question before me is: What do the statutes
3 require, federal and state in this regard? And it is in
4 that area that the respondent, I believe, has a problem.
5 First, I am ruling only on competent evidence and with that
6 comment, I'm disposing with the evidentiary objections.
7 I'm not going to address them specifically.

8 Second, consistent with our discussion at the
9 outset, this is not a situation where this Court is
10 constrained by a Federal Judge's order. The parties may
11 seek and indeed there may be such an order in the future,
12 but it is not in place now.

13 The lawsuit that was filed resulted in the
14 settlement and the Advisory Opinion was dismissed, but
15 there were not findings of fact, nor a conclusion that the
16 Advisory Opinion contained in the settlement agreement was
17 an accurate statement of the law.

18 Therefore, I am appropriately free to address the
19 substantive issues.

20 I think there are three of them, and let me address
21 each one. First, really involves the interpretation of
22 2725. The Nurse Practices Act and the scope and authority
23 of that measure. When I interpret the statute, I look not
24 only at that specific statute, but the statutory matrix in
25 this area specifically on the issue of administering
26 insulin in schools, and the matrix as a whole -- when you
27 look at the matrix as a whole, it is clear to me that this
28 statute has been construed and applied in the context as a

1 whole as a measure which prohibits the administration of
2 insulin by properly trained personnel in the school
3 setting.

4 A number of the exceptions, for example, that we've
5 referred to here, the emergency situations and others for
6 the administration of insulin in the school specifically
7 come from statutory authority, provide a specific exception
8 in their wording to 2725. This is true, for example, with
9 regard to foster parents as well.

10 There is a statutory core that controls the scope of
11 practice for nurses that is founded in 2725 and has been
12 statutorily applied and extended to other statutes in terms
13 of exceptions that have been provided that prohibit the
14 type of practice that the Respondent and Intervenor seek
15 here.

16 The Board's policy statement is consistent with
17 that. It's entitled to some deference, but the statutory
18 matrix as a whole controls the Court's interpretation here.

19 I then look to an alternative theory surrounding the
20 Education Code that in the context of 49423 et. seq. there
21 is concurrent and even from the respondent's point of view
22 overriding authority in the Department of Education to
23 promulgate regulations that affect the scope of practice as
24 defined under 2725 and related statutes.

25 I don't believe that's true. I think the provisions
26 under 49423 et. seq, the regulations that would have to be
27 promulgated or theoretically have been promulgated have to
28 be consistent with state law.

1 And that state law includes 2725 and the recognition
2 that specific statutory exceptions have previously been
3 required in order to allow the use of injections,
4 administering of injections by nonlicensed personnel.

5 I am not persuaded, although, there is a detailed
6 argument here of distinction made with regard to the
7 "assist and administer." They are fundamentally different.
8 You look to it seems to me in this context the plain
9 meaning of the words.

10 What is interesting and not controlling, but as part
11 of the historical context in which you can interpret these
12 statutes is the California education frequently asked
13 questions, the document that was promulgated and then
14 removed after the Legal Advisory decisions that essentially
15 concludes and advises the schools to act in the same way
16 that the Court has just ruled.

17 One, 2725 controls scope. Two, there is specific
18 statutory exemptions and you can only administer insulin
19 consistent with those that the term "assist and administer"
20 are plainly not synonymous and they reach the same point of
21 view.

22 Coincidentally, I hadn't noticed the same position
23 of the Court. I hadn't noticed that until after I had
24 noticed this document, until I had worked my way through
25 the lawsuit, but it is consistent with my ruling here.

26 Then we go to the authority of this Legal Advisory
27 that was promulgated pursuant to the lawsuit, and whether
28 or not it is fundamentally correct. I don't think it is.

1 First of all, there has to be a conflict between the
2 federal law and the state law and this is the statutory
3 conflict. This is not an issue of funding or not funding.
4 There may be alternative lawsuits that that can compel
5 funding, indeed, I've had those and so ordered.

6 But they can be reconciled because the federal law
7 provides for appropriate personnel and the State of
8 California statutorily identified who can perform this
9 service. There is a nursing shortage, but if this Court
10 could change the statute with regard to scope of practice
11 to resolve the nursing shortage as it affects children who
12 need insulin; I could change the scope of practice as well
13 with regard to all the other functions that nurses provide
14 or indeed doctors provide. I can't do that. I don't have
15 that power, not in the context of this lawsuit.

16 In a way this was recognized by some of the folks
17 before me who sought, and of course were unsuccessful with
18 the legislation that they passed and placed on the
19 Governor's desk in 2002.

20 This is not an issue of federal preemption of a
21 statute. The statute is not -- federal statute is not
22 inconsistent with the statute as written by the State. The
23 federal statute, the State may be in breach in fulfilling
24 its obligation in not adequately funding in its current
25 program matrix, the services required under the ADA, but
26 that does not give this Court the ability to rewrite
27 statutes.

28 I cannot adopt my own statutory exception for foster

1 parents as has been statutorily adopted, or my own
2 exception for emergency situations which has been
3 statutorily adopted by decreeing that properly trained
4 school personnel can provide this service.

5 Finally, I haven't spent much time on this in terms
6 of the hearing, it represents from the Court's perspective
7 an alternative ruling, but this Legal Advisory Opinion as
8 it is promulgated and applied is effectively a rule.

9 It has broad impact, indeed, they are seeking the
10 enforcement of that impact through this litigation. It did
11 not go through the APA procedure. It peremptts effectively
12 prior rules in this area. Arguably, it peremptts from the
13 Court's perspective the statute so it constitutes a
14 violation of APA.

15 That's my ruling. For the folks over here who are
16 really disappointed, I am really confident in this ruling.
17 You'll appeal it. And I may be reversed, it wouldn't be
18 the first time. You have a statutory problem that is
19 legislatively based. This is not a Court problem that can
20 be resolved by the Court rewriting statutes. I don't have,
21 no judge has that authority.

22 I am sorry, petition is granted. Would you prepare
23 a judgment consistent with my ruling.

24 MS. CONES: Well, your Honor.

25 MS. BONNINGTON: Thank you, your Honor.

26 MS. JOHANSEN: Thank you.

27 (Hearings concluded.)

28 --o0o--

1 CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

2 STATE OF CALIFORNIA)
 3) SS.
 4 COUNTY OF SACRAMENTO)

5 I, Jodee H. Weinrich, hereby certify that I am an
 6 Official Certified Shorthand Reporter, and that at the
 7 times and places shown, I recorded verbatim in shorthand
 8 writing all the proceedings in the following described
 9 action completely and correctly, to the best of my ability:

10 Court: Superior Court of California,
 11 County of Sacramento

12 Case: American Nurses, et al. Petitioners
 13 vs. Jack O'Connell, et al., Respondents.

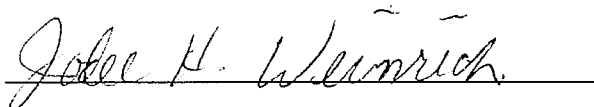
14 Case No.: 07AS04631

15 Dates: Friday, November 14, 2008

16 I further certify that my said shorthand notes
 17 have been transcribed into typewriting, and that the
 18 foregoing pages 1 to 61, inclusive, constitute an accurate
 19 and complete transcript of all of my shorthand writing for
 20 the dates and matter specified.

21 I further certify that I have complied with CCP
 22 237(a)(2) in that all personal juror identifying
 23 information have been redacted, if applicable.

24 Dated: November 15, 2008

25 

26 JODEE H. WEINRICH, CSR NO. 3060

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