S184583

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AMERICAN NURSES ASSOCIATION, ET AL.,

Plaintiff and Respondents,

v.

JACK O'CONNELL, AS SUPERINTENDENT OF PUBLIC INSTRUCTION, ETC., ET AL.,

Defendants and Appellant.

AMERICAN DIABETES ASSOCIATION,

Intervener, Appellant and Petitioner.

After a Decision by the Court of Appeal,
Third Appellate District, Case No. C061150

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT AMERICAN DIABETES ASSOCIATION

CLAIRE RAMSEY (SBN 246997)
CHILD CARE LAW CENTER
445 Church Street, 4th Floor
San Francisco, CA 94102
Telephone: 415.558.8005

MIRIAM A. VOGEL (SBN 67822)
BENJAMIN J. FOX (SBN 193374)
SHELLA L. SADOVNIK (SBN 267551)
LINDSAY M. ANDREWS (SBN 271394)
MORRISON & FOERSTER LLP
555 West Fifth Street, Suite 3500
Los Angeles, California 90013-1024
Telephone: 213.892.5200
Facsimile: 213.892.5454

Attorney for Amicus Curiae
CHILD CARE LAW CENTER

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INTRODUCTION

If the Court of Appeal's opinion is affirmed, licensed nurses will almost certainly be required to administer routine medications in settings where, as a practical matter, a nurse is not and cannot be available, thus jeopardizing the health and safety of thousands of young children attending nursery schools, child care centers and after-school care throughout California. The result? Havoc for tens of thousands of families when well-run but financially strapped child care centers exclude children with conditions requiring the routine administration of medication, and other centers close their doors entirely to avoid the inevitable civil rights lawsuits triggered by the inability to accommodate children with medical needs in child care settings.

Amicus curiae Child Care Law Center respectfully invites this Court's attention to the predicament facing licensed family-run child care and other child care programs as a result of the Court of Appeal's conclusion — that, notwithstanding the federal statutory scheme, virtually every administration of medication at a school or child care program in California is a "nursing function" requiring the services of a nurse or other health care professional. In short, the Court of Appeal's opinion likely will be interpreted to impose requirements on child care centers that cannot be reconciled with the number of nurses available in California, the needs of very young children, or the resources of their parents and child care providers.

The vast majority of child care programs (one-third of which are conducted in family homes) do not have a nurse on staff and, given the nursing shortage in California and the limited resources of most centers, they cannot be expected to hire nurses. These child care programs care for

infants, toddlers and pre-kindergarten aged children (including children with diabetes, epilepsy and other common conditions), and the care provided often includes — or did include until the Court of Appeal rendered its decision — the administration of medication pursuant to guidelines permitting trained caretakers who are not nurses to administer medication supplied by a parent. Unless reversed, the decision under review will ensnare child care providers in protracted litigation over their right and responsibility to admit and care for children with medical needs.

The Court of Appeal reached the wrong result — its holding conflicts with the Americans with Disabilities Act, and it is bad for children, their parents, and child care providers. It should be reversed.

CHILD CARE LAW CENTER'S INTEREST IN THIS CASE

Child Care Law Center is a nonprofit legal services organization working to make high quality, affordable child care available to children, families, and communities. The Center receives funding from California's Interest on Lawyers Trust Accounts program (IOLTA) and is the only organization in the country devoted exclusively to the complex legal issues affecting child care. Child Care Law Center's work addresses public benefits, civil rights with a specific focus on the inclusion of children with disabilities, housing, regulations, and licensing.

Although the Court of Appeal's opinion deals directly with insulin administration by unlicensed but trained school personnel at public schools, the opinion's interpretation of the Nursing Practice Act (NPA), including Business and Professions Code section 2725, inevitably will affect the administration of medication in licensed programs throughout the state, including in pre-kindergarten and after-school care centers. (Slip Opn. 5-6.)

The Center is uniquely positioned to assist the Court in evaluating the ramifications of the Court's of Appeal's opinion as it will apply to young children with disabilities as well as those in need of routine administration of medication while in child care.

LEGAL ARGUMENT

I. IF AFFIRMED, THE RAMIFICATIONS OF THE COURT OF APPEAL'S DECISION WILL REACH FAR BEYOND THE PUBLIC SCHOOL SETTING AND WILL AFFECT CHILDREN WITH OTHER MEDICAL ISSUES, NOT ONLY DIABETES.

A. The Court of Appeal's Decision Threatens The Safety Of Young Children In Child Care Programs.

The result reached by the Court of Appeal threatens the health and safety of many thousands (potentially millions) of California children in child care centers, family child care homes and after-school care. Children and their families rely on child care providers to administer medication ranging from antibiotics for ear infections and other ailments to life-saving, emergency medication for seizures and other conditions. The Court of Appeal's broad interpretation of section 2725 of the Business and Professions Code prevents child care providers that are unable to employ resident nurses from providing necessary care and medicine to children in their care and, ultimately from providing child care to those children.[1]

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[1] To state the obvious, pre-kindergarten aged children (and many other young children) need help with routine medications such as oral antibiotics and cold medications, frequently given by placing a syringe in the child's mouth. Would this too require a nurse's assistance following the Court of Appeal's opinion?

Child care is a fundamental need for hundreds of thousands of California families with children under six years old — indeed, the National Association of Child Care Resource and Referral Agencies estimates that 1.7 million California children under the age of six need child care.[2] At least 10,850 child care centers and 38,989 family child care homes in California together provide approximately one million licensed child care spaces. (Fn. 2, *ante*.) Child care centers supply approximately 65 percent of all available care; the remaining 35 percent is provided by licensed family child care homes. (Fn. 2, *ante*.)

Access to safe, affordable child care is crucial to a family's economic survival. Seventy five percent of parents needing child care require it because the parents' employment renders them unavailable to provide care during the workday. Sixteen percent of parents need child care to attend school or other training programs and eight percent need it because they are seeking employment.[3] Many children spend most of the day in child care — nationally, children of working mothers spend 36 hours a week in child care.[4] Again, toddlers and pre-kindergarten children are too

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[2] National Association of Child Care Resource and Referral Agencies (NACCRRA), *2011 Child Care in the State of: California* <http://www.naccrra.org/randd/data/docs/CA.pdf> (as of May 10, 2011).

[3] California Child Care Resource & Referral Network, *2009 Child Care Portfolio* <http://www.rrnetwork.org/our-research/uploads/2009-portfolio/california-statewide.pdf> (as of May 10, 2011).

[4] NACCRRA, *Leaving Children to Chance: NACCRRA's Ranking of State Standards and Oversight of Small Family Child Care Homes 2010 Update* (Mar. 2010) at p. 2 <http://www.naccrra.org/ publications/ naccrra-publications/publications/854-0000_Lvng%20_Children%202%20 Chance_rev_031510.pdf> (as of May 10, 2011).

young to self-administer medication and thus must be cared for by someone who can give them their required daily and emergency medications.

B. Children In Child Care Programs Require Medication Administration.

Children in child care (not just students in school) experience a range of acute and chronic health conditions, many of which require daily prescription and non-prescription medication. The most frequently administered medications in child care centers and family child care homes are antibiotics, acetaminophen, antihistamines, bronchodilators, decongestants, eye medication, iron, cough medicine, topical medications, and medications for chronic conditions (including seizure disorders, cystic fibrosis, and other chronic illnesses).[5]

In addition to medications for routine illnesses, child care workers provide health care monitoring and medication for children with conditions such as epilepsy, cancer, diabetes, and severe asthma affecting a significant number of California children — for example, 90,000 California children have epilepsy.[6] Many of these children require one or more daily doses of antiepileptic medication to control and prevent seizures and, during prolonged or repetitive seizures, may require a diazepam rectal gel which must be "given promptly to avoid serious neurological damage, or even death," and (according to the Epilepsy Foundation) "may be safely

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[5] University of Cal. San Francisco School of Nursing California Childcare Health Program, *Medication Administration in Child Care Programs* <http://www.ucsfchildcarehealth.org/pdfs/healthandsafety/medadminEN102004_adr.pdf> (as of May 10, 2011).

[6] Assembly Concurrent Resolution No. 167 (2009-2010 Reg. Sess.) resolution chapter 154.

administered by caregivers without medical training, including parents and child care staff."[7] Similarly, severe asthma may require frequent medication to avoid potentially fatal attacks — and asthma is the most common chronic medical condition among children (nearly 20 percent of California's students have asthma[8] and almost 20 percent of that population is under five years old[9]). In addition to inhalers, asthmatic children often need medications such as Claritin or Zyrtec to minimize the effects of environmental triggers for an asthma attack. Approximately 14,000 California children have diabetes, nearly all of whom require insulin administration multiple times a day to avoid short-term and long-term complications of the disease.

Children with cancer attend child care programs and will likewise be devastated by the Court of Appeal's decision. More than 1,100 children under age 15 are diagnosed with cancer each year in California,[10] and these

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[7] Epilepsy Foundation, *Education & Day Care: Advocating for Your Child* (2008), at pp. 6-7 <http://epilepsyfoundation.org/epilepsylegal/upload/EDUCATION-FINAL-199EDC.PDF> (as of May 10, 2011).

[8] Cal. Dep't of Health Srvcs., *California Asthma Facts: Asthma in Schools: Results from the California Healthy Kids Survey, 2001-2003* (Oct. 2004) <http://www.california breathing.org/resources/cb-pubs-new/nomination-forms> (as of May 10, 2011).

[9] Bloom B. et al., *Summary of Health Statistics for U.S. Children:* National Center for Health Statistics. Vital Health Stat. 10(247) (Dec. 2010) <http://www.cdc.gov/nchs/data/series/sr_10/sr10_247.pdf> (as of May 12, 2011).

[10] American Cancer Society, Cal. Department of Public Health, Cal. Cancer Registry, *California Cancer Facts & Figures 2011* (Sept. 2010), at p. 26 <http://www.ccrcal.org/pdf/Reports/ACS_2011.pdf> (as of May 10, 2011).

children often need medication (such as anti-nausea pills or Solu-Cortef injections to treat the side effects of chemotherapy or radiation treatments).

Given the significant percentage of parents required to work long hours to raise their children and provide them with both the basics and the specialized health care they require, it is not surprising that thousands of California families rely heavily on center-based care, family child care homes, and other child care providers to administer routine and emergency medications for a wide range of illnesses and other medical conditions.

C. Child Care Providers Currently Administer Medication To Children Without The Assistance Of A Nurse.

Child care providers currently administer prescription and non-prescription medications subject to section 101226(e) of title 22 of the California Code of Regulations, which takes into account the realities and pressing needs of families using child care resources. Pursuant to title 22, section 101226(e), child care providers may administer medications (prescription and non-prescription) subject to parental approval, health and safety standards, and (for prescription medication) a physician's directions. Because the parents of children with chronic health conditions cannot work unless they have an appropriate child care provider, and because those parents must work to earn money to care for their children, this house of cards collapses without a state-sanctioned system of child care centers that can administer medications as well as provide custodial care. In many instances child care workers are the *only* people available to administer necessary medication for young children. (Fn. 4, *ante*.)

D. California Suffers From A Severe Shortage Of Nurses, But Even If There Were More Of Them, Many Child Care Programs Cannot Afford A Nurse On Staff.

The American Diabetes Association's opening brief on the merits explains the dramatic shortage of registered nurses in California and, more specifically, the fact that there are not enough nurses to provide care for all public school children in California. (See, e.g., OB 7.) The shortage of qualified nurses is even more pronounced in the pre-kindergarten and child care setting, where providers and families face more severe logistical and financial limitations — with almost 50,000 child care programs in California providing care for at least one million children. (Fn. 2, *ante*.)

The grim reality is that it is financially impossible for child care centers and family child care homes to either hire or contract for registered or licensed vocational nurses to administer everyday medications. California has 58,310 child care workers in centers and family child care homes earning an average annual income of $23,730. (Fn. 2, *ante*.) By contrast, the median annual wage for a California registered nurse is $85,843, and $50,388 for a licensed vocational nurse.[11]

The vast majority of child care centers cannot afford to pay for full or part-time nursing services. Average annual costs for full-time center care are $11,276 for an infant and $7,856 for a 4-year old. (Fn. 2, *ante*.) Family child care homes, on average, charge $6,854 for an infant and $6,595 for a 4-year old (fn. 2, *ante*), an enormous burden for families

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[11] Employment Development Department, State of California, *Occupational Employment Statistic Survey Results* (1st Quarter 2010) <http://www.labormarketinfo.edd.ca.gov/?pageid=152> (as of May 10, 2011).

earning an average annual income of $43,000.[12] If compelled to provide full, or even part-time, registered or licensed vocational nurses, child care centers and family child care homes would necessarily have to pass those costs on to parents, thereby forcing many families to resort to unlicensed child care options, to forgo employment and be thrown into poverty, or to leave their very young children inadequately supervised. The Legislature could not have intended this result.

II. AN INTERPRETATION OF THE NURSING PRACTICE ACT THAT MAKES ALL MEDICATION ADMINISTRATION A NURSING FUNCTION NEGATIVELY AFFECTS CHILDREN IN LICENSED CHILD CARE SETTINGS.

A. Child Care Centers Are Intended To Provide For The Well-Being Of Children In A Setting That Often Requires The Administration of Medication.

Health and Safety Code section 1596.750 defines a child day care facility as "a facility that provides nonmedical care to children under 18 years of age in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual on less than a 24-hour basis." This definition goes to the essence of licensed child care in California — it is unequivocally non-medical care, not to be confused with facilities where the primary purpose is providing medical care to children on an outpatient or inpatient basis. That said, child care is focused on the well-being of children and must include "assistance essential for sustaining the activities of daily living or for the protection of the individual." (Health & Saf. Code, § 1596.750.)

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[12] Bureau of Business and Economic Research, University of New Mexico <http://bber.unm.edu/econ/us-pci.htm> (as of May 10, 2011).

For children with health care needs and disabilities, this "essential assistance" must include medication administration.

Given the medical needs of many children and licensed child care's charge to supervise and care for children, the California Child Day Care Act and its related regulations provide a framework for medication administration in licensed child care programs. (Health & Saf. Code, § 1596.70 et seq.) Before the Court of Appeal's decision, that framework did not contemplate scouring the state in search of a nurse each time a young child needed medication while at child care.

B. The California Code of Regulations Provides A Workable Model For Administering Medication In Child Care Settings In Which A Nurse Is Unavailable; This Model Is Threatened By The Court Of Appeal's Opinion.

Health and Safety Code section 1596.81 authorizes the Department of Social Services to adopt rules and regulations to implement the California Child Day Care Act. Under this authority, section 101226(e) of title 22 of the California Code of Regulations was adopted to authorize personnel at child care centers and family day care homes to administer medications (prescription and non-prescription) when specified health and safety requirements are met.

The regulations require, among other safeguards, (a) administration only in accordance with label directions as provided by the child's physician; (b) written authorization and instructions from the parent or guardian to administer the medication, consistent with the physician's instructions; (c) recording and daily reporting of all administrations of medication to the parent or guardian; and (d) procedures for the safe storage and handling of the medication. (Cal. Code Regs., tit. 22, § 101226(e).)

California's model for medication administration in licensed child care settings balances the needs of children with medical conditions with the realities of pre-kindergarten and other care settings for very young children. The Court of Appeal's decision destroys that model by making all medication administration a nursing function unless a clear statutory exception to the Nursing Practice Act *for each specific medication* expressly permits unlicensed personnel to administer medication, a test the nurses will surely claim cannot be met by the child care framework. This result could not have been intended by the Legislature.

III. UNLESS REVERSED, THE COURT OF APPEAL'S DECISION WILL RESULT IN BURDENSOME, SITE-SPECIFIC LITIGATION ABOUT WHETHER CHILD CARE PROGRAMS THROUGHOUT THE STATE MUST PROVIDE LICENSED NURSES TO ADMINISTER MEDICATIONS.

A. The Court of Appeal's Decision Conflicts With The Americans With Disabilities Act.

The Court of Appeal's decision directly conflicts with the Americans with Disabilities Act and California law. Unless reversed by this Court, trained staff in child care programs who do not have nursing licenses will be faced with an untenable choice — comply with the Americans with Disabilities Act by making reasonable accommodations for children who need their medication, or violate the Act by complying with a rule that says only licensed nurses can provide medication (which as a practical matter would compel the child care program to reject children who need medication during the time they are in care).

Most child care centers are places of "public accommodation" within the meaning of Title III of the Americans with Disabilities Act. (42 U.S.C. § 12181(7)(j)-(k); *Roberts v. KinderCare Learning Centers* (8th Cir. 1996)

86 F.3d 844, 846 ["Daycare centers, such as KinderCare, are 'public accommodations'"].) Unless a "fundamental alteration" that would place an "undue burden" on the center is required to comply with the Act, child care centers (and even family child care homes) must make reasonable accommodations to their policies and practices to provide for children with disabilities. (42 U.S.C. § 12182(b)(2)(A)(ii); *Roberts v. KinderCare Learning Centers, supra*, 86 F.3d at p. 846.)

Before the Court of Appeal filed its opinion, California's child care providers made reasonable accommodations for children with disabilities by allowing trained, non-nursing staff to administer medication when necessary. The Department of Justice, in a series of enforcement actions under the Americans with Disabilities Act, has not only allowed child care providers to administer medication but has *compelled* them to do so. For example, a Department of Justice enforcement action against a child care center (La Petite Academy, Inc.) resulted in a settlement requiring the center's staff to administer a pen-like device with epinephrine in the event of an allergic reaction by a child.[13] In the settlement of another Department of Justice action against another child car center, the center agreed that its staff would administer insulin and monitor "children with diabetes while using blood glucose monitoring tests, insulin pumps, syringes . . ."[14]

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[13] *Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and La Petite Academy, Inc.* <http://usdoj.gov/crt/ada/lapetite.htm> (as of Apr. 14, 2011).

[14] *Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Rainbow River Child Development Center* <http://www.ada.gov/rainbow_river /rainbow_river_ sa.htm> (as of Apr. 14, 2011).

These enforcement actions underscore the untenable predicament created by the Court of Appeal's opinion. Child care providers must choose between the specter of civil enforcement actions under the Americans with Disabilities Act on the one hand, and a violation of the Nursing Practice Act (as construed by the Court of Appeal) on the other. This Court should correct this conundrum.

B. This Court Should Resolve The Conflict Created By The Court Of Appeal's Opinion Because The Opinion, If Affirmed, Will Result In Burdensome, Site-Specific Litigation.

If this Court affirms the Court of Appeal's opinion, child care providers will be vulnerable to expensive lawsuits under the Americans with Disabilities Act. If administering medication to children is no longer a "reasonable accommodation" under the Act but rather against state law because it violates the Nursing Practice Act, child care providers will either price themselves out of the market or turn away children who need daily medications. Whatever it does, the child care program will face a serious threat of one kind of litigation or another. (*Staron v. McDonald's Corp.* (2d Cir. 1995) 51 F.3d 353, 356 ["the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry"]); *Tuck v. HCA Health Services* (6th Cir. 1993) 7 F.3d 465, 471; and see 49 U.S.C. § 12182(b)(2)(A)(ii); *Alvarez v. Fountainhead, Inc.* (N.D.Cal. 1999) 55 F.Supp.2d 1048, 1051 [public accommodation must "make reasonable modifications to its policies, practices, and procedures where necessary to ensure full and equal enjoyment of its services by individuals with disabilities"].)

Unless this Court reverses, site-specific legal battles are inevitable — to determine whether each child care center is able to hire a nurse or is

exempt from the Americans with Disabilities Act's mandates. (*Johnson v. Gambrinus Co./Spoetzl Brewery* (5th Cir. 1997) 116 F.3d 1052, 1059.)[15]

C. An Affirmance Of The Court Of Appeal's Decision Would Assuredly Create Unsafe Environments For California's Children.

Most child care centers serve only a few children and have a very small staff. (Family child care homes may have only a single staffer.) Nurses are exceedingly rare in child care settings and, unlike in schools, there is no expectation that a nurse will be present. Almost all children in child care are too young to self-administer medication of any kind. As a result, children in need of medication will be put in jeopardy because no one at the child care program will be legally authorized to administer medication.[16]

Although parents would still be allowed to administer medication to their children, it is not realistic to expect them to be present to do so after dropping off their children at child care. Parents generally use child care services because their workplace demands prevent them from caring for their children during the workday. A decision that prohibits child care personnel from administering medication to children will mean that some children will not be able to safely attend child care. None of the

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[15] To be clear, we are not conceding that the exclusion of a significant number of children would be permissible under federal law, but merely noting the dilemma child care providers will face unless this Court holds that the Americans with Disabilities Act preempts the Nurses Practice Act in this context.

[16] See California Child Care Resource and Referral Network, *2009 California Child Care Portfolio* <http://www.rrnetwork.org/our-research/2009-portfolio.html> (as of May 10, 2011).

alternatives — forcing parents to quit work, or leaving children in unlicensed care or unsupervised — is acceptable.

CONCLUSION

For the foregoing reasons and those stated in the American Diabetes Association's briefs, the Court of Appeal's decision should be reversed.

Dated: May 12, 2011

Respectfully submitted,

MORRISON & FOERSTER LLP

-- AND --

CHILD CARE LAW CENTER

By: 

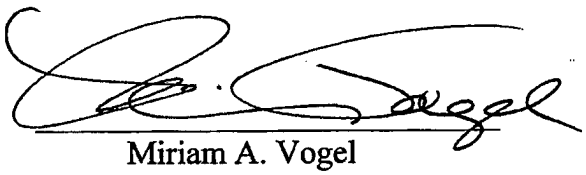
Miriam A. Vogel

Attorneys for Amicus Curiae
Child Care Law Center

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this brief was produced using 13-point type and contains 3,693 words.

May 12, 2011



Miriam A. Vogel

PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 555 West Fifth Street, Los Angeles, California 90013-1024. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on May 12, 2011, I served a copy of:

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Please see following service list

Alice L. Bodley 8515 Georgia Avenue, Suite 400 Silver Spring, MD 20910-3492	*Attorneys for Respondents American Nurses Association Via Overnight Delivery*
Maureen E. Cones 8515 Georgia Avenue, Suite 400 Silver Spring, MD 20910-3492	*Attorneys for Respondents American Nurses Association Via Overnight Delivery*
Jocelyn Winston 8515 Georgia Avenue, Suite 400 Silver Spring, MD 20910-3492	*Attorneys for Respondents American Nurses Association Via Overnight Delivery*
John S. Poulos Carrie Bonnington Pillsbury Winthrop Shaw Pittman LLP 2600 Capitol Avenue, Suite 300 Sacramento, CA 95816-5930	*Attorneys for Respondents American Nurses Association, American Nurses Association/California, California School Nurses Organization, and California Nurses Association Via Overnight Delivery*
Pamela S. Allen California Nurses Association 2000 Franklin Street, Suite 300 Oakland, CA 94612-2908	*Attorneys for Respondents California Nurses Association Via Overnight Delivery*
Ava Chikako Yajima California Department of Education 1430 "N" Street, Suite 5319 Sacramento, CA 95814-5901	*Attorneys for Defendant and Appellant Jack O'Connell Via Overnight Delivery*
Robin B. Johansen Remcho Johansen & Purcell, LLP 201 Dolores Avenue San Leandro, CA 04577-5007	

Shereen Arent
American Diabetes Association
1701 North Beauregard Street
Alexandra, VA 22311

Attorneys for Intervenor and Appellant American Diabetes Association
Via Overnight Delivery

Larisa Maureen Cummings
Arlene Mayerson
Disability Rights Education & Defense Fund, Inc.
3075 Adeline Street, Suite 210
Berkeley, CA 94703-2578

James M. Wood
Dennis Peter Maio
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659

Eve R. Hershcopf
Interim Directing Attorney
Child Care Law Center
445 Church Street, 4th Floor
San Francisco, CA 94102

Attorney for Amici Curiae Child Care Law Center, Disability Rights California, Child Care Inclusion Challenge Project, and BANANAS (in support of Petition for Review)
Via Overnight Delivery

Patricia Cleary Dukes
Epilepsy Foundation of America
8301 Professional Place
Landover, MD 20785-2353

Attorney for Amicus Curiae Epilepsy Foundation of America (in support of Petition for Review)
Via Overnight Delivery

Melanie Leah Balestra
Cummins & White, LLP
2424 S. E. Bristol Street, Suite 300
Newport Beach, CA 92660-0764

Attorney for Amici Curiae National Association of School Nurses, American Occupational Therapy Association, Inc., Arkansas School Nurses Association, Association of periOperative Registered Nurses, Association of School Nurses of Connecticut, California Association for Nurse Practitioners, California School Health Centers Association, Coalition of Labor Union Women, Colorado Association of School Nurses, Delaware School Nurses Association, Emergency Nurses Association, Florida Association of School Nurses, Georgia Association of School Nurses, Illinois Association of School Nurses, Illinois Nurses Association, Indiana Association of School Nurses, Iowa School Nurses Organization, Kentucky School Nurses Association, Maine Association of School Nurses, Maryland Association of School Health Nurses, Massachusetts School Nurse Association, Michigan Association of School Nurses, National Association of Pediatric Nurse Practitioners, National Association of State School Nurse Consultants,

National Board for Certification of School Nurses, Nebraska School Nurse Association, New Hampshire School Nurse Association, New Jersey State School Nurses Association, New Mexico School Nurses Association, New York State Association of School Nurses, Ohio Association of School Nurses, Pennsylvania Association of School Nurses and Practitioners, Rhode Island Certified School Nurse Teachers, Rhode Island Institute for Nursing, Rhode Island State Nurses Association, School Nurse Organization of Arizona, School Nurse Organization of Idaho, School Nurse Organization of Minnesota, School Social Work Association of America, South Carolina Association of School Nurses, Tennessee Association of School Nurses, Utah School Nurse Association, Vermont State School Nurses Association, Virginia Association of School Nurses, West Virginia Association of School Nurses, Wisconsin Association of School Nurses, Wyoming School Nurses Association
Via Overnight Delivery

Laura Pauline Juran California Teachers Association 1705 Murchison Drive Burlingame, CA 94010-4504	*Attorney for Amicus Curiae California Teachers Association* *Via Overnight Delivery*
Jeffrey B. Demain Altshuler Berzon LLP 177 Post Street, Suite 300 San Francisco, CA 94108-4733	
Jeffrey B. Demain Altshuler Berzon LLP 177 Post Street, Suite 300 San Francisco, CA 94108-4733	*Attorneys for Amicus Curiae American Federation of Teachers* *Via Overnight Delivery*
Jeffrey B. Demain Altshuler Berzon LLP 177 Post Street, Suite 300 San Francisco, CA 94108-4733	*Attorneys for Amicus Curiae California Federation of Teachers* *Via Overnight Delivery*
Michael R. Clancy California School Employees Association 2045 Lundy Avenue San Jose, CA	*Attorneys for Amicus Curiae* California School Employees Association *Via Overnight Delivery*
Jeffrey B. Demain Altshuler Berzon LLP 177 Post Street, Suite 300 San Francisco, CA 94108-4733	*Attorneys for Amicus Curiae* California School Employees Association *Via Overnight Delivery*
Jason David Russell Skadden, Arps, Slate, Meagher & Flom LLP 300 South Grand Avenue, Suite 3400 Los Angeles, CA	*Attorneys for Amici Curiae Los Angeles Unified School District, Children's Rights Clinic, Disability Rights Advocates, Disability Rights California, Disability Rights Legal Center, Disability Rights Texas, The Legal Aid Society – Employment Law Center* *Via Overnight Delivery*

Lisa Charlotte Demidovich
United Nurses Association of California
955 Overland Court, Suite 150
San Dimas, CA 91773-1740

Attorney for Amicus Curiae United Nurses Association of CA/Union of Health Care Professionals
Via Overnight Delivery

Robin Bradle Johansen
Remcho Johansen & Purcell, LLP
201 Dolores Avenue
San Leandro, CA

Attorney for Amicus Curiae Tom Torlakson, California Department of Education
Via Overnight Delivery

Lenore Ann Silverman
Fagan Friedman & Fulfrost
70 Washington Street, Suite 205
Oakland, CA 94607-3705

Attorney for Amicus Curiae California School Boards Association
Via Overnight Delivery

Samuel Robert Bagenstos
U.S. Department of Justice
P. O. Box 14403
Washington, D.C. 20044-4403

Attorney for Amicus Curiae United States
Via First-Class U.S. Mail

Daniel Einhorn, MD, FACP. FACE
President
American Association of Clinical Endocrinologists
245 Riverside Avenue, Suite 200
Jacksonville, FL 32202

Amicus Curiae American Association of Clinical Endocrinologists (in support of Petition for Review)
Via Overnight Delivery

Myles Abbott, MD
District Chair
American Academy of Pediatrics, California District
107 South Fair Oaks Avenue, Suite 318
Pasadena, CA 91105

Amicus Curiae American Academy of Pediatrics, California District (in support of Petition for Review)
Via Overnight Delivery

Clerk
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814-1398

Attention: Hon. Lloyd G. Connelly

Clerk
Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814-4734
Via Overnight Delivery

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California, this 12th day of May, 2011.

C. BIBEAU _____