Agenda Item 5.0

Discussion and Possible Action Regarding Declaratory Decision with Precedential Effect on the Question Presented By Atkinson, Andelson, Loya, Ruud & Romo: Does a registered nurse commit misconduct subject to disciplinary action when the nurse administers medicinal cannabis to a qualified patient student on a school campus pursuant to a physician's care plan? (Gov. Code, §§ 11425.60 & 11465.10 et seq.; 1 CCR § 1260 et seq.)

BRN Board Meeting | February 16-17, 2022

BOARD OF REGISTERED NURSING
Board Meeting

AGENDA ITEM: 5.0
DATE: February 16-17, 2022

ACTION REQUESTED: Discussion and Possible Action Regarding Declaratory Decision with Precedential Effect on the Question Presented By Atkinson, Andelson, Loya, Ruud & Romo (AALRR): Does a registered nurse commit misconduct subject to disciplinary action when the nurse administers medicinal cannabis to a qualified patient student on a school campus pursuant to a physician's care plan? (Gov. Code, §§ 11425.60 & 11465.10 et seq.; 1 CCR § 1260 et seq.)

REQUESTED BY: Dolores Trujillo, RN, Board President

BACKGROUND:

The law firm of Atkinson, Andelson, Loya, Ruud & Romo submitted a request to the Board for a declaratory decision concerning the following question:

> Does a registered nurse commit misconduct subject to disciplinary action when the nurse administers medicinal cannabis to a qualified patient student on a school campus pursuant to a physician's care plan?

At the Board Meeting on November 30, 2021, the Board voted to issue a declaratory decision with precedential effect. In accordance with the regulations governing the procedure for declaratory decisions, the Board issued a notice of declaratory decision proceeding on December 30, 2021, to potentially interested parties, and allowed for the submission of public comment.

The Board will now discuss the merits of the question presented and vote on the outcome of this declaratory decision proceeding.

NEXT STEPS: Discuss at Board Meeting

FINANCIAL IMPLICATIONS, IF ANY: None

PERSON TO CONTACT:
Reza Pejuhesh
Board Legal Counsel
Reza.Pejuhesh@dca.ca.gov

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL LAW CORPORATION
ATTORNEYS AT LAW
5075 HOPYARD ROAD, SUITE 210
PLEASANTON, CALIFORNIA 94588-3361
(925) 227-9200

FAX (925) 227-9202
WWW.AALRR.COM

CERRITOS (562) 653-3200
FRESNO (559) 225-6700
IRVINE (949) 453-4260
MARIN (628) 234-6200
PASADENA (626) 583-8600
RIVERSIDE (951) 683-1122
SACRAMENTO (916) 923-1200
SAN DIEGO (858) 485-9526

MDavis@aalrr.com
(925) 251-8504

OUR FILE NUMBER:
005948.00148
35342429.1

November 30, 2021

VIA CERTIFIED MAIL AND EMAIL TO LORETTA.MELBY@DCA.CA.GOV

Loretta Melby RN, MSN
Executive Officer
Board of Registered Nursing
Department of Consumer Affairs
1747 N. Market Blvd., Suite 150
Sacramento, CA 95834-1924

Re: Application for Declaratory Decision

Dear Ms. Melby:

Please consider this letter an Application for a Declaratory Decision pursuant to 1 CCR § 1264.

I. Applicant's Contact Information

Nevada Joint Union High School District
11645 Ridge Road
Grass Valley, CA 95945
C/O Atkinson Andelson, Loya, Ruud & Romo, P.C.
5075 Hopyard Rd, Suite 210
Pleasanton, CA 94588

II. Statement of the Situation

A high school student enrolled in the Applicant District has a diagnosed severe seizure condition. Student's physician has recommended the use of two cannabis medications to treat the condition: a CBD:THC tincture as a maintenance medication and a THC intranasal spray as a rescue medication to be administered upon the onset of a seizure.

School districts are required by the federal Individuals with Disabilities Education Act ("IDEA"), Section 504 of the Rehabilitation Act of 1973, and by Education Code, section 56040 et seq. to provide students with a qualifying disability a free and appropriate public education ("FAPE") in the least restrictive environment. An eligible student's individualized education

program ("IEP") is developed by a multidisciplinary team (including school administrators, the student, parents, and health professionals) to provide for a FAPE in the least restrictive environment. Here, Student's IEP team has determined that the student requires access to nursing services to assist with the administration of medical cannabis during the school day in order for Student to be afforded a FAPE.

School districts employ medical personnel to provide a variety of health related services in the public school setting. These services may include the administration of "medication" as provided for in Education Code, section 49423. "Medication" "may include not only a substance dispensed in the United States by prescription, but also a substance that does not require a prescription, such as over-the-counter remedies, nutritional supplements, and herbal remedies." (Cal. Code Regs., tit. 5, § 601.)

A Registered Nurse's broad scope of practice includes "those functions, including basic health care, that help people cope with difficulties in daily living that are associated with their actual or potential health or illness problems or the treatment thereof, and that require a substantial amount of scientific knowledge or technical skill…." (Bus. & Prof. Code § 2725). These functions include "[d]irect and indirect patient care services that ensure the safety, comfort, personal hygiene, and protection of patients; and the performance of disease prevention and restorative measures" as well as "[d]irect and indirect patient care services, including, but not limited to, the administration of medications and therapeutic agents, necessary to implement a treatment, disease prevention, or rehabilitative regimen ordered by and within the scope of licensure of a physician." (*Id*.)

Nurses are subject to discipline for engaging in unprofessional conduct, which includes, but is not limited to: incompetence or gross negligence in carrying out usual nursing functions. (Bus. & Prof. Code § 2761). "Gross negligence" means "extreme departure from the standard of care which, under similar circumstances, would have ordinarily been exercised by a competent registered nurse." (Cal. Code Regs. tit. 16, § 1442.) An extreme departure would be demonstrated by "the repeated failure to provide nursing care as required or failure to provide care or to exercise ordinary precaution in a single situation which the nurse knew, or should have known, could have jeopardized the client's health or life." (*Id*.)

Student is a qualified patient under the Compassionate Use Act ("CUA"). (Health & Safety Code §§ 11362.5, 11362.7(f).) The CUA exempts qualified patients and their primary caregivers from the criminal statutes prohibiting the possession and administration of cannabis, including on school campuses. (*See* Health & Safety Code §§ 11357; 11362.5(d); 11362.7(d); 11362.765.) California law extends this protection from prosecution to individuals that assist qualified patients and their primary caregivers in the administration of medicinal cannabis. (Health & Safety Code § 11362.765.)

Health & Safety Code, section 11362.8, provides that "[a] professional licensing board shall not impose a civil penalty or take other disciplinary action against a licensee based solely

on the fact that the licensee has performed acts that are necessary or appropriate to carry out the licensee's role as a designated primary caregiver to a person who is a qualified patient…." (Health & Safety Code § 11362.8.) Accordingly, the legislature has already provided that a registered nurse ("RN") is not subject to discipline for acting as a primary caregiver. (*Id*.)

We are unaware of any specific law or regulation arising under the Nursing Practice Act that prohibits an RN from administering medicinal cannabis pursuant to a physician's treatment plan, regardless of the location of the administration.

Federal law treats cannabis as a Schedule I controlled substance pursuant to the Controlled Substances Act, 21 U.S.C. § 812, and prohibits the possession and non-remunerated distribution of small amounts of cannabis "unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice." 21 U.S.C. § 844.

Since 2014, the United States Department of Justice ("DOJ") has been prohibited from using congressionally apportioned funds to prevent California's implementation of its medical cannabis laws. (*See* Consolidated Appropriations Act, 2021, § 531). The Ninth Circuit has interpreted this spending limitation to mean that the DOJ is "prohibited from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws." (*United States v. McIntosh*, 833 F.3d 1163, 1176-77 (9th Cir. 2016).)

In 2018, the Office of Administrative Hearings ruled on a similar fact pattern in *Rincon Valley Union Elementary School District* (OAH 2018) No. 2018050651 (a complete copy of the decision is attached for reference). The administrative law judge ("ALJ") in that decision found that it was permissible for LVNs to administer medicinal cannabis; that such administration was strictly compliant with the Compassionate Use Act; and that concerns about federal prosecution were alleviated by the then-existing Consolidated Appropriations Act, the likely defense to a federal cannabis prosecution, and mounting evidence that cannabis has a medical benefit. Overall, the ALJ found that federal concerns did not alleviate the District from its obligations under the IDEA to provide FAPE to the student whose IEP team had determined her need for supportive nursing services to administer the cannabis on campus, and that administration of medicinal cannabis was within the LVN's scope of practice.

Based on the foregoing, our current understanding is that:

1. California law establishes a state medical cannabis program that authorizes the use, possession, cultivation, and administration of medicinal cannabis and exempts qualified patients, primary caregivers, and those assisting in the administration of medicinal cannabis from prosecution under state law. California professional licensing boards may not take disciplinary action against a licensee for performing acts necessary to serve as a primary caregiver to a qualified patient. Because these activities are permitted by the

state's medicinal cannabis laws, conduct that strictly complies with these laws may not be subject to prosecution by the federal government.

2. Similarly, physicians are authorized to recommend and develop medicinal cannabis plans for their qualified patients. RNs who competently and professionally implement these plans, or supervise the implementation of such plans, do not appear subject to licensing discipline solely because they act within the scope of practice to carry out medical orders or implement a treatment plan from a licensed physician, including on school grounds—whether they do so as a primary caregiver or as an individual assisting a qualified patient or primary caregiver.

3. For a special education student whose need to access medicinal cannabis on campus may not be met by any other reasonable measure in order for that child to receive a FAPE under the IDEA, that student is likely entitled to necessary services, pursuant to an IEP team determination, to access medicinal cannabis while at school.

III. Applicant's Standing To Raise The Issue Or Interest In The Determination Of The Issue

Applicant is a public school district that employs registered nurses. As described above, the Applicant is actively addressing a matter that requires input regarding the nursing scope of practice from the Board of Registered Nursing. The situation faced by Applicant involves significant legal and policy determinations of general application and is one that is likely to recur. Accordingly, Applicant requests that the Board considers designating its decision as precedential.

IV. Relevant Rules, Orders, Statutes, Or Final Administrative Decisions Of The Agency

Nursing Practice Act, Business & Professions Code §§ 2700 et seq.

Grounds for Discipline, Disciplinary Proceedings and Rehabilitation, 16 CCR §§ 1441 et seq.

V. Questions For Which A Declaratory Decision Is Sought

Does a registered nurse commit misconduct subject to disciplinary action when the nurse administers medicinal cannabis to a qualified patient student on a school campus pursuant to a physician's care plan?

VI. Hearing Request

The Applicant defers to the BRN's discretion regarding the setting of a hearing.

VII. A Good Faith List Of All Interested Persons By Relevant Description Or By The Names, Addresses, And Phone Numbers Of Such Persons, If Available

Interested Party	Contact
California Office of the Attorney General	Office of the Attorney General 1300 "I" Street Sacramento, CA 95814-2919 Email: AGelectronicservice@doj.ca.gov
California Department of Education	California Department of Education 1430 N Street Sacramento, CA 95814-5901
California School Nurses Organization	CSNO 3511 Del Paso Rd. Suite 160, PMB 230 Sacramento, CA 95835 Email: csno@csno.org
California School Boards Association	California School Boards Association 3100 Beacon Boulevard West Sacramento, CA 95691
California Teachers Association	CTA State Headquarters 1705 Murchison Drive Burlingame, CA 94010 Governmental Relations 1118 – 10th Street Sacramento, CA 95814
Board of Vocational Nursing & Psychiatric Technicians	Board of Vocational Nursing and Psychiatric Technicians 2535 Capitol Oaks Drive Suite 205 Sacramento, CA 95833 Email: bvnpt@dca.ca.gov
California Department of Public Health	California Department of Public Health PO Box 997377, MS 0500 Sacramento, CA 95899-7377

Medical Board of California	Medical Board of California 2005 Evergreen Street, Suite 1200 Sacramento, CA 95815 Email: webmaster@mbc.ca.gov
Osteopathic Medical Board of California	Osteopathic Medical Board of California 1300 National Drive, Suite #150 Sacramento, CA 95834-1991 E-mail: Osteopathic@dca.ca.gov
California Department of Cannabis Control	California Department of Cannabis Control 2920 Kilgore Road Rancho Cordova, CA 95670 California Department of Cannabis Control 930 Sixth Street Eureka, CA 95501 Email: info@cannabis.ca.gov
California Department of Food & Agriculture	California Department of Food and Agriculture 1220 N Street Sacramento, CA 95814
Parents and legal guardians of public school pupils who are "qualified patients" under the Compassionate Use Act	

If there are any questions regarding the foregoing, or if any further information would assist you in addressing the question posted by this letter, please do not hesitate to contact me at mdavis@aalrr.com or by phone at 925-251-8504.

Very truly yours,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Michael J. Davis

MJD:kmr
Enc. Statement re the Rincon Valley Decision

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. RINCON VALLEY UNION ELEMENTARY SCHOOL DISTRICT.	OAH Case No. 2018050651

DECISION

Parent on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings on May 14, 2018, naming the Rincon Valley Union Elementary School District. On June 5, 2018, OAH advanced the matter on the calendar and set it for hearing. On June 19, 2018, OAH granted a continuance at Student's request.

Administrative Law Judge Charles Marson heard the matter in Santa Rosa, California, on July 25, 2018.

Joe Rogoway, Blair N. Gue and Lindsay Whyte, Attorneys at Law, represented Student, who was not present. Student's mother attended the hearing on Student's behalf.

Jennifer E. Nix, Attorney at Law, represented Rincon Valley. Cathy Myhers, Rincon Valley's Assistant Superintendent for Student Services, attended the hearing on its behalf.

On July 25, 2018, at the parties' request, OAH continued the matter to August 27,

2018, for closing briefs. On that day the parties filed closing arguments, the record was closed, and the matter was submitted for decision.

ISSUE

Does Rincon Valley's April 27, 2018 individualized education program offer to place Student at home with one hour a day of instruction constitute an offer of a free appropriate public education in the least restrictive environment?

SUMMARY OF DECISION

Student has Dravet Syndrome, which causes life-threatening seizures. She proved that prompt access to tetrahydrocannabinol oil as an emergency medication for her seizures is medically necessary for her to attend school. She also proved that, in two years of preschool, Mother and Student's nurse successfully provided her with prompt access to THC oil as an emergency seizure medication.

Student established that Rincon Valley's IEP placement offer effectively barring her from its campus and school bus was based not on her educational needs but on the concern that her presence, with her medication, might violate state and federal law. Student proved, however, that for the past two years, the possession, administration and ingestion of THC oil for Student's seizures strictly complied with California's medical marijuana laws and were lawful under state law.

The offered IEP was not reasonably calculated to allow Student to benefit from it, because its exclusion of Student from the campus and school bus was based on a misunderstanding of state law, and on the remote possibility that possessing THC oil might violate an unenforced and unenforceable federal misdemeanor, prohibiting marijuana possession. Since Student may successfully attend a public school campus and be transported to and from it, while maintaining access to her emergency medication, her least restrictive environment is on a public school campus, not at home.

Student therefore proved that Rincon Valley's April 27, 2018 offer of home placement did not offer her a FAPE.

FACTUAL FINDINGS

JURISDICTION

1. Student is a five-year-old girl who lives with Parents within Rincon Valley's boundaries. She has Dravet Syndrome and related illnesses, and has been receiving special education and related services in the primary category of Other Health Impaired and the secondary category of Intellectual Disability.

2. Student's Dravet Syndrome causes serious seizures at unpredictable times, including in school. The seizures are successfully controlled by the immediate administration of THC oil, a derivative of cannabis. The parties agree that at all times while in school, Student must have a nurse present who has ready access to THC oil as an emergency medication to control Student's seizures, and who can administer the THC oil within one to four minutes of the beginning of the seizure. If a seizure lasts longer than that, Student must be taken to the emergency room.

3. In the school years 2016-2017 and 2017-2018, Student attended Humboldt Community School, a private preschool, at Rincon Valley's expense and pursuant to an IEP. Student's IEP provided her the services of a licensed vocational nurse who carried THC oil as a rescue medication and accompanied Student at all times on the school bus and at school, administering the oil immediately when Student seized.

4. On April 27, 2018, the parties met at an IEP team meeting to create an IEP for the school year 2018-2019, Student's kindergarten year. The parties agreed that Student cannot be safely educated, unless her seizure medication is readily available at all times. Rincon Valley declined to offer Student placement on a public school campus, or transportation by public school bus, because of its concern that possession of the

THC oil on a public school campus or bus was prohibited by state and federal law. Rincon Valley therefore decided that the only safe and legal placement for Student was at home, and offered to place Student at home with one hour of instruction a day, along with the continued services of the licensed vocational nurse to administer the THC oil in the event of a seizure. Parents, believing that Student may lawfully attend a public school campus and ride a public school bus, accompanied by her nurse and emergency medication, filed this request for due process hearing.

5. Student's kindergarten year started on August 13, 2018. Student has been attending a Rincon Valley kindergarten class and going to and from school on a public school bus pursuant to a stay put order.

STUDENT'S MEDICAL NEED FOR THC OIL

6. Mother established by her undisputed testimony that Student needs close adult supervision at all times to control her seizures. After Student was diagnosed with Dravet Syndrome, Mother quit her job and devoted herself full-time to Student's care, including her housing, health, and safety.

7. The nature of Student's disability was established at hearing by Dr. Joseph Sullivan, who is a pediatric neurologist, an Assistant Professor of Clinical Neurology at the University of California San Francisco, the Director of its Pediatric Epilepsy Center, and the Chair of its Pediatric Epilepsy Research Consortium Steering Committee. He has also founded a Dravet clinic at the university. Dr. Sullivan is a leading expert on Dravet Syndrome, has published many peer-reviewed papers on the subject, and has received numerous honors and awards. Dr. Sullivan has been treating Student for Dravet since she was three years old. His testimony was credible because it was based on his expertise and experience in the field, and on his familiarity with Student. His testimony was not disputed.

8. Dr. Sullivan testified at hearing by declaration. He established that Dravet

Syndrome is a rare, catastrophic, lifelong form of epilepsy that begins in the first year of life, with frequent and sometimes prolonged seizures. A seizure that is quickly controlled may not have immediate side effects, but the longer it goes on, the harder it is to treat. A prolonged seizure is one that lasts for more than five minutes. The cumulative effect of hundreds of seizures over time results in developmental stagnation and intellectual disability. A patient with Dravet Syndrome commonly displays frequent and prolonged seizures, delayed speech and language, behavioral and developmental delays, and movement and balance difficulties. All of these difficulties affect Student.

9. Dr. Sullivan further established that Dravet must be treated with daily medication and sometimes a restrictive diet, but it is "highly resistant to currently available medications." Multiple medications are used for preventative purposes, although when used together they have side effects such as somnolence, lethargy, behavior difficulties, weight changes and dulling of cognition. Dr. Sullivan and Mother tried numerous traditional medications with Student, such as Keppra, Depakote and Onfi, but they did not alleviate her seizures.

10. Dr. Sullivan also established that Dravet seizures are unpredictable, so it is essential that a Dravet patient have an effective rescue medication nearby at all times to be administered according to a personally tailored seizure rescue plan. If a seizure lasts longer than 15 minutes, secondary brain injury will result.

11. Dr. Sullivan was familiar with the use of cannabis-based medications as a preventive measure for Dravet. He was an investigator on the Epidiolex Expanded Access Program published in *The Lancet Neurology* in 2016. Epidiolex, a cannabis-based product, reduced seizures in patients studied by 37 percent.[1] Dr. Sullivan has concluded

[1] Epidiolex has recently been approved on a trial basis by the Food and Drug Administration for the treatment of seizures in Dravet patients.

that "[c]annabis is effective in reducing seizures in patients with Dravet who are already taking conventional medications, yet still continue to have upwards of 12 seizures a month." Student was having up to 20 seizures a month when he began to treat her.

12. Dr. Sullivan also believes that cannabis can be used for Dravet patients as an emergency rescue medication. In the event of a seizure, it is sprayed in liquid form inside the cheek and is absorbed quickly into the bloodstream.

13. Under Dr. Sullivan's supervision, Student's family began to use cannabis-based CBD oil as a preventative medication and THC oil as an emergency seizure medication. Dr. Sullivan reported that the use of these cannabis-based medications "has reduced the frequency of [Student's] seizures and given her more seizure-free days." Parents reported to him, and Mother confirmed at hearing, that while using these medications, Student had enjoyed her longest seizure-free period since her seizures began.

14. Dr. Sullivan credibly declared that if Student were to stop using these cannabis-based medications, "her overall seizure frequency may increase and if not allowed to use cannabis rescue medication, her tendency for longer seizures would go up."

15. Parents also consulted Dr. Bonni Goldstein of Canna-Centers in Southern California. Dr. Goldstein examined Student in her office and concluded that she "may benefit from the use of medical marijuana." Dr. Goldstein provided Mother a physician statement concluding: "I approve [her] use of marijuana as medicine." Because of federal law, Dr. Goldstein did not formally prescribe the medication, but she described her conclusion as her professional opinion and as a "recommendation" within the meaning of California's Compassionate Use Act. Dr. Goldstein also certified Mother as Student's primary caregiver for the purpose of the Act.

16. Student has long been a patient at Kaiser Hospitals, and has been treated in several of its emergency rooms and in Oakland, where its child neurologists are based. Kaiser has provided Parents a formal protocol for the administration of THC oil and other medications to Student. The current version of Kaiser's Plan of Treatment for Student includes a "Seizure Protocol" which requires the administration of THC oil at the first sign of seizure.

17. The evidence convincingly showed that Student's Dravet Syndrome is life-threating; that she has seizures at unpredictable times, including in school; that the proximity of THC oil and a caretaker or medical professional trained to administer it, is essential to controlling her seizures, and therefore to her safety and well-being throughout the school day; and that the medication has been successfully administered under the supervision and with the advice of physicians according to a formal seizure protocol.

STUDENT'S SUCCESSFUL ATTENDANCE AT PRESCHOOL

18. By the time Student entered preschool in fall 2016, she was already using cannabis-based medications, including THC oil. Notwithstanding her occasional seizures, she was able to attend preschool for two school years, grow socially and in skills, and learn to interact with other children. Student argues that the medical procedures which allowed Student to succeed in preschool are the same procedures that Rincon Valley should have put in an IEP that placed her on a public school campus for kindergarten.

19. On Student's third birthday, her education became the responsibility of Rincon Valley. Rincon Valley was willing to provide Student extensive services, but initially took the position that it could not place her on a campus because state and federal law forbade possession of THC oil on a campus. After negotiations, Rincon Valley agreed to place Student in an appropriate private preschool if one could be found. The parties jointly searched for such a school, and found Humboldt Community School, a

single-classroom private school for students aged two to five. Rincon Valley placed Student there pursuant to an IEP on which the parties agreed. The IEP provided for nursing services throughout the day, which the parties understood would include possession and administration of the THC oil.

20. Rincon Valley contracted with At Home Nursing of Santa Rosa, for a licensed vocational nurse who would accompany Student and help administer her medications, including the THC oil, throughout the school day in case she seized. Yolanda Brindis was the licensed vocational nurse who cared for Student during the 2017-2018 school year, and addressed her seizures on the bus and at school. At hearing, she described in detail how she used the THC oil.

21. On a typical school day, Ms. Brindis went in the morning to Parent's home, where Mother provided her two vials, each containing 15 milliliters (0.5 fluid oz.) of THC oil. Ms. Brindis helped with feeding Student breakfast and dressing her, and then she and Student got on the school bus. Ms. Brindis carried the vials of THC oil at all times while caring for Student; no one else had access to them. At school Ms. Brindis remained within a few feet of Student. Student's seizures are usually preceded by warning signs, such as a flushed face, a red neck, spasmodic movement, and the like. As soon as Ms. Brindis saw those signs and knew a seizure was imminent, she took Student to a safe place where she could lie down.

22. Student must always have an oxygen pump available, which she uses frequently and especially during seizures. At the onset of a seizure at school, Ms. Brindis asked another teacher to bring the oxygen equipment, and then administered 0.3 milliliters of THC oil to Student by spraying it on the inside of her cheek. Usually, Student would recover from the seizure within minutes. If the seizure lasted more than four minutes, Ms. Brindis had to call for transportation to an emergency room.

23. At the end of the school day the process was reversed. Ms. Brindis and Student rode the school bus home and entered the house, and at the end of her shift, Ms. Brindis returned the THC oil to Mother. Ms. Brindis's testimony showed that her practice in keeping and administering the THC oil, precluded its possession or use by anyone else on the campus or on the bus, and eliminated any potential for abuse.

24. Supported by this process, Student enjoyed and benefited from her preschool years. Joseph LeBlanc, who was both the Director of the preschool and one of its teachers, observed her in class during her two years there. At hearing, he described Student's growth and change. When she first arrived, she showed no interest in other children and was focused on adults. But over those two years, her awareness of her surroundings and the people around her grew, and her interests expanded, and now she enjoys the company of other children and has learned to interact with them to some extent. Recently, she has joined other children in projects and has learned to share materials with them. Student also progressed in her ability to navigate the classroom physically, which, with approximately 26 other active preschool children, required skill at maneuvering.

25. At hearing, Ms. Brindis and Mother confirmed that Student made substantial progress in preschool. Ms. Brindis thought her progress was "amazing," particularly in socialization. Mother agreed, stating that Student had developed mentally and socially in the preschool. At the beginning, Student was able to greet adults (such as occupational and speech therapists) and ask them to play. By the end of her preschool years, she had refocused those requests on other children.

26. Student's preschool IEP documents describe the progress she made. At a February 27, 2017 IEP team meeting, school staff reported that her social curiosity had recently increased and she had begun to know how to ask for help. By the time of her annual IEP team meeting in May 2017, the preschool instructors reported that Student

"made great strides this year in adjusting to new teachers, new therapists, a school routine, and being around peers." In May 2018, the IEP team reported that she had learned colors, letters, and some numbers, and could successfully interact with peers in a small group of five children. The preschool provided progress reports on 11 of the goals in her May 2017 IEP. Student fully met four of them and made partial progress on the rest.

27. Mr. LeBlanc established that Student's medical requirements, including the presence of her nurse and her medicine, did not disrupt the class. Student's presence had no negative impact on the other children in class. Even when she seized, the impact on the other students was "extremely minimal." Ms. Brindis expressed the same opinion.

28. The evidence described above showed that in her two years of attending preschool, Student made significant progress socially and academically. Her occasional seizures were promptly and successfully controlled by her nurse, and were not significantly disruptive for the other students or staff.

29. Rincon Valley does not dispute that Student made such progress. Ms. Myhers, Rincon Valley's Assistant Superintendent for Student Services, supervises the district's special education program, has attended Student's IEP team meetings, and was thoroughly familiar with Student and her educational history. Ms. Myhers was forthright in testifying that, if it were not for the possible illegality of possessing THC oil on the campus and the bus, a public school campus would be Student's least restrictive environment. She testified further that she did not disagree with Dr. Sullivan's conclusion that Student needs to be in a classroom to continue her development.

30. The parties also agree that Student needs help with socialization. The disputed April 2018 IEP observes that she "needs a specialized learning environment for both optimum learning and socialization . . ." The IEP contains 12 annual goals, at least 3 of which require Student to be in the presence of other students. Goal 1 addresses

transitions to small group activities. Goal 2 addresses the degree of her participation in morning circle time. Goal 5 seeks to improve her response to a student sitting next to her by handing over a toy, art material or other object.

31. Asked at hearing how Student could make progress on those goals if placed at home, Ms. Myhers described it as "very challenging." She testified that the program specialist serving Student at home would "if possible" attempt to create situations involving other children. Ms. Myhers mentioned the possibility of gathering groups or creating play dates with other children in the neighborhood. The April 2018 IEP does not, however, contain any provision for such activities. On cross-examination, she conceded that some of the goals in the disputed IEP "may not" be capable of implementation in a home environment.

32. Ms. Myhers also testified that Rincon Valley barred Student from its campus in part to avoid jeopardizing the District's funding mechanisms. She testified that to receive federal funding, the district was required to provide a declaration that it would have drug- and alcohol-free campuses. She was concerned that allowing Student on campus with her medication "could potentially jeopardize" funding for the entire district because the "federal guideline is that I have to be able to declare that it's a drug-free campus." However, Ms. Myhers did not identify any particular guideline or requirement of law that caused this concern.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA[2]

1. This hearing was held under the Individuals with Disabilities Education Act,

[2] Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);[3] Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means appropriate special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) Related services, called "designated instruction and services" in California, specifically include nursing services when the student requires them to attend school. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subds. (a), (b)(12).)

3. In *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to

[3] All subsequent references to the Code of Federal Regulations are to the 2006 version.

specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. __ [137 S.Ct. 988, 197 L.Ed.2d 335]. It explained in *Endrew F.* that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) As applied to the student in *Endrew F.*, who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Endrew F., supra*, 137 S.Ct. at p. 1001.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard, Student had the burden of proof.

ISSUE: WAS THE APRIL 27, 2018 IEP AN OFFER OF FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

A. Mother, student, and the nurse strictly complied with California law in possessing and using thc oil as an emergency seizure medication, and could do so on a public school campus and bus without violating California law

6. The parties agree, and the evidence showed, that the THC oil used as emergency medication for Student's seizures by Mother and the nurse is cannabis within the meaning of Health and Safety Code section 11018. That definition includes the plant Cannabis sativa L. and "every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin."

7. Section 11357 of the Health and Safety Code has long prohibited the possession of cannabis. In its current form, the section provides that a person less than 21 years of age who possesses not more than 28.5 grams of cannabis, or not more than 8 grams of concentrated cannabis, is guilty of an infraction. (Health & Saf. Code, § 11357(a)(1), (2).) The statute contains a specific subdivision addressing possession on school grounds by an adult:

> (c) Except as authorized by law, a person 18 years of age or older who possesses not more than 28.5 grams of cannabis, or not more than eight grams of concentrated cannabis, upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 to 12, inclusive, during hours the school is open for classes or school-related programs is guilty of a misdemeanor . . .

(Health & Saf. Code, § 11357, subd. (c).) Thus, unless Student's nurse was authorized by law to possess and administer the THC oil on a school campus or bus, her

possession of it would have been a state law misdemeanor.

8. However, Student's nurse was so authorized. In 1996, California voters removed the legitimate medical use of marijuana from the reach of the criminal law by approving an initiative measure entitled the Compassionate Use Act. (Health & Saf. Code, § 11362.5.) The new statute declared that the purpose of the Act was:

> To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(*Id.*, subd. (b)(1)(A).) The new statute also declared the related purpose of protecting patients and their caregivers from prosecution:

> To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(*Id.*, subd. (b)(1)(B).) The Compassionate Use Act expressly exempts patients and their primary caregivers from the general criminal prohibition of section 11357:

> (d) Section 11357 relating to the possession of marijuana, . . . shall not apply to a patient, or to a patient's primary caregiver, who possesses . . . marijuana for the personal

> medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(*Id.,* subd. (d).)

9. The evidence showed that possession and use by Student's nurse of THC oil at the preschool and on the school bus met all the requirements of the Compassionate Use Act, and was therefore "authorized by law" within the meaning of section 11357, subdivision (c). Mother qualified as Student's primary caregiver under the Act's applicable definition:

> . . . "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

(Health & Saf. Code, § 11362.5, subd. (e).) The evidence showed that Parents, acting on Student's behalf, had designated Mother as her primary caregiver, and that Mother had consistently assumed responsibility for Student's housing, health and safety. Dr. Goldstein formally designated Mother as a primary caregiver within the meaning of the Compassionate Use Act. The nurse acted as Mother's agent, as well as, the school's agent, receiving the THC oil from Mother at the start of the day and returning it at the end. Student, Mother and the nurse were therefore exempt from prosecution under section 11357 and were authorized by the Compassionate Use Act to possess and use the THC oil for its medical purpose.

10. The Compassionate Use Act is not to be interpreted to supersede legislation prohibiting persons from "engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes." (Health & Saf. Code § 11362.5, subd. (b)(2).) The evidence showed that Mother and the nurse possessed the

THC oil solely for the personal medical purposes of Student, and did so in a fashion that precluded access to it, or abuse of it, by others. The use of the THC oil on Rincon Valley's campus, in the same way that it was used in the preschool, would not endanger others or permit any diversion of the oil for nonmedical purposes.

11. The evidence showed that Student was "a seriously ill Californian." (Health & Saf. Code, § 11362.5, subd. (b)(1)(A).) It showed further that Dr. Goldstein, a licensed physician in California, recommended that Student use marijuana for medical purposes after examining her and determining that such medical use was appropriate, and that Student's health would benefit from the use of marijuana in the treatment of an "illness for which marijuana provides relief," namely Dravet Syndrome. (*Ibid.*) And although Dr. Sullivan's declaration was cautious and did not expressly use the term "recommendation," he made it clear that Student was his patient; that he had discussed the use of medical marijuana with Mother; and that he approved of and supported Student's medical use of marijuana, both as maintenance medication and emergency seizure relief medication, believing that it has significantly reduced her incidence of seizures. Kaiser Hospitals also recommended the use of THC oil in Student's emergencies by requiring its use in the emergency seizure protocol it provided to Mother and the nurse.

12. Nurse Brindis acted under an additional legal authorization. She was a vocational nurse licensed in California and was acting within the scope of her licensure in possessing the TCH oil and administering it to Student in emergencies. The Vocational Nursing Practice Act allows a licensee, when directed by a physician, to inject medications, to draw blood, and to administer intravenous fluids in accordance with written standardized procedures. (Bus. & Prof. Code, §§ 2840, 2860.5.) Nurse Brindis always followed the emergency seizure protocol for Student provided by Kaiser Hospitals, whose physicians had long managed Student's health. That protocol required

the use of THC oil in the first minutes of a seizure.

13. Because Mother and Ms. Brindis were authorized by law to possess and use the THC oil as they did, their conduct was exempt from another California statute specifically regulating the presence of cannabis on a public school campus. Health and Safety Code section 11362.1 generally authorizes the possession of small amounts of cannabis by persons 21 years of age or older. Section 11362.3 makes exceptions to that rule. It begins by providing that "Section 11362.1 does not permit any person" to do certain acts, including possessing cannabis "in or upon the grounds of a school . . . while children are present." (Health & Saf. Code, § 11362.3, subds. (a), (a)(5).) But that same section ends by exempting from its limitations any possession allowed by the Compassionate Use Act. Subsection (c) of the statute provides: "Nothing in this section shall be construed or interpreted to amend, repeal, affect, restrict, or preempt laws pertaining to the Compassionate Use Act of 1996." Section 11362.1 is also not intended to restrict laws pertaining to the Compassionate Use Act. (Health & Saf. Code, § 11362.45, subd. (i).)

14. Section 11362.79 of the Health and Safety Code lists places where the smoking of medical cannabis is prohibited, including "[o]n a school bus." (*Id.*, subd. (c).) But that statute relates only to the smoking of marijuana, not to its medical use in concentrated form, such as sprayed THC oil, which is how Student receives it.

15. Rincon Valley correctly points out that Student's nurse would have to transport the THC oil to and from school, and argues that her transportation of it would not be protected by California law. It is true that the original Compassionate Use Act left caregivers vulnerable to charges of transportation of marijuana, because it explicitly protected only possession and cultivation. (See Health & Saf. Code § 11362.5, subd. (d); *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773; *People v. Young* (2001) 92 Cal.App.4th 229, 237.) However, the Legislature closed that gap in the 2003 Medical

Marijuana Program Act (Health & Saf. Code §§ 11362.7 et seq.) by protecting from a charge of transportation any qualified patient, caregiver, or "[a]n individual who provides assistance to a qualified patient . . . or . . . caregiver . . ." (Health & Saf. Code, §§ 11362.765, subds. (b)(1)-(3).)

16. Rincon Valley argues that the language "who provides assistance" in the 2003 Act (Health & Saf. Code §§ 11362.765, subd. (b)(3)) is not broad enough to extend to the transportation of marijuana. However, that unduly narrow interpretation contradicts the purposes of the Compassionate Use Act and the 2003 Medical Marijuana Program Act, which was intended "to address issues not included in the CUA so as to promote the fair and orderly implementation of the CUA." (*People v. Wright* (2006) 40 Cal.4th 81, 85.) The 2003 enactment expressly extended protection from transportation prosecutions to qualified patients and their caregivers. (Health & Saf. Code, § 11362.765, subds. (b)(1), (2).) It is not likely that, in the next subdivision, it intended the opposite result for those who "provide[] assistance" to those patients and caregivers. (*Id.*, subds. (b)(3).) As the court put it in *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550, "the voters could not have intended that a dying cancer patient's 'primary caregiver' could be subject to criminal sanctions for carrying otherwise legally cultivated and possessed marijuana down a hallway to the patient's room." Nor could they have intended to subject to criminal sanctions someone like Student's nurse, who was assisting a qualified caregiver and a qualified patient within the terms of her licensure.

17. Properly interpreted, section 11362.765, subdivision (b)(3) of the Health and Safety Code would protect Student's nurse from state prosecution for transporting marijuana if she followed the same procedures on a public school campus that she did in the preschool. (See *People v. Frazier* (2005) 128 Cal.App.4th 807, 827 [recognizing defense to transportation charges by those providing assistance]; *People v. Roberts* (Oct. 28, 2008, No. C053705) 2008 WL 5098984, p. 45[same].)

18. For the above reasons, the evidence showed that Mother and the nurse strictly complied with California law at school, on the bus and at home, in possessing and using the THC oil as an emergency medication for administration to Student in the event of a seizure.

B. Strict compliance with California law by mother, student and the nurse may have exempted them from the federal law prohibiting possession of marijuana, and did exempt them from federal prosecution

MARIJUANA IN THE FEDERAL CONTROLLED SUBSTANCES ACT OF 1970

19. The Controlled Substances Act regulates or prohibits the possession and use of many drugs, including marijuana. (21 U.S.C. § 801 et seq.) It defines "marihuana" in relevant part as including "Cannabis sativa L., . . .; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." (21 U.S.C. § 802(16).) The parties agree, and the evidence showed, that THC oil is within that definition.

20. The Controlled Substances Act, groups drugs into schedules in order to regulate them in different ways. Marijuana is a Schedule One drug. (21 U.S.C. § 812(b)(1), Schedule I (c)(10).) A Schedule One drug "has no currently accepted medical use in treatment in the United States." (21 U.S.C. § 812(b)(1)(B).) Prescriptions can be written for drugs on schedules two, three, four and five, but not for drugs on Schedule One. (21 U.S.C. § 829.) The only exception is for a government-authorized research program; there is no defense of medical necessity. (See 21 U.S.C. § 823(f)[last par.]; *Gonzales v. Raich* (2005) 545 U.S. 1, 26–29 [125 S.Ct. 2195, 162 L.Ed.2d 1]; U*nited States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 494-495 [121 S.Ct. 1711, 149 L.Ed.2d 722].)

UNDERMINING THE PREMISE IN THE CONTROLLED SUBSTANCES ACT

Actions by State Legislatures

21. Since 1970, and especially in recent years, Congress's determination that marijuana has no legitimate medical uses has been thoroughly undermined by state legislatures. By 2016 at least 40 states and 3 territories allowed the use of marijuana for medical purposes in some fashion. (See *United States v. McIntosh* (9th Cir. 2016) 833 F.3d 1163, 1175, fn. 3.) Since then the number has grown; an appropriations bill now pending in Congress lists 46 states and 3 territories as having such laws. (H.R. 1625, 115th Cong., 2d Sess., § 538, p. 240 < https://perma.cc/XQ34-E5Q5> [as of Sept. 18, 2018].

22. In addition, several states have enacted legislation specifically allowing the administration of medical marijuana on public school campuses. (See, e.g., Colo.Rev.Stat.Ann., 22-1-119.3(3)(d.5) [Colorado]; 105 ILCS 5/22-33 [Illinois]; 22 M.R.S.A. § 2426, subd. 1A [Maine]; F.S.A. § 1006.062(8) [Florida].) This suggests a growing recognition among states that the Controlled Substances Act is not a bar to the appropriately authorized and regulated use of medical marijuana on public school campuses.

23. On September 5, 2018, the California Legislature enrolled and presented to Governor Brown for signature Senate Bill 1127, which would add section 49414.1 to the Education Code. That section would allow school districts to enact policies permitting a parent or guardian of a pupil who is a qualified patient under the Compassionate Use Act to possess and administer medicinal cannabis to the pupil at a school site. (<http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB1127> [as of September

18, 2018].)[4]

24. Such a consensus among the states is quite likely to alter the interpretation of federal law. "[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (*Atkins v. Virginia* (2002) 536 U.S. 304, 312 [122 S.Ct. 2242, 153 L.Ed.2d 335] (quoting *Penry v. Lynaugh* (1989) 492 U.S. 302, 331 [109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) [consensus among states against execution of mentally retarded]; see also *Minnesota Voters Alliance v. Mansky* (2018) 585 U.S. ___ [138 S.Ct. 1876, 1886, 201 L.Ed.2d 201][consensus among states on need for campaign-free zones around polling places]; *Miller v. Alabama* (2012) 567 U.S. 460, 482 [132 S.Ct. 2455, 183 L.Ed.2d 407][consensus among states against execution of minors]; *Jaffee v. Redmond* (1996) 518 U.S. 1, 13 [116 S.Ct. 1923,135 L.Ed.2d 337][consensus among states on adoption of psychotherapist-patient privilege].) The near-consensus of state legislatures in accepting the medical uses of marijuana strongly suggests that no federal court would now convict Student or her caregivers for the conduct examined here.

Actions by Federal Administrative Agencies

25. Federal administrative action has also undermined the premise of the treatment of marijuana in the Controlled Substances Act. In 2009, the United States Department of Justice announced that prosecutions of medical marijuana users complying with state medical marijuana laws would receive lower priority than other possession cases. (*Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (October 19, 2009) <www.justice.gov/opa/documents/medical-

[4] If signed into law, the new statute will not entirely resolve this dispute. Student needs her seizure medication within four minutes of the onset of a seizure, and Mother cannot get to the campus that quickly.

marijuana.pdf>[as of Sept. 18, 2018].) In 2013, the Department of Justice announced it would no longer prosecute marijuana possession cases involving the possession of small amounts of marijuana and would instead defer to state prosecutorial mechanisms. (*Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013) <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [as of September 18, 2018].) In January 2018, the previous guidances were rescinded in favor of earlier prosecutorial guidelines for the exercise of prosecutorial discretion. (<https://www.justice.gov/opa/press-release/file/1022196/ download>[as of Sept. 18, 2018].) Judging from the absence in the reported cases of actual federal prosecutions for possession of small amounts of state-sanctioned medical marijuana, the exercise of federal prosecutorial discretion has continued to show deference to state decision-making and abstention from such prosecutions.

26. In addition, in June 2018, after extensive study, the Federal Food and Drug Administration approved the trial use of Epidiolex, a cannabis-based medicine, for the treatment of Lennox-Gastaut Syndrome and Dravet Syndrome (which Student has) in patients two years of age and older. (Federal Drug Administration, Press Release, June 25, 2018, FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy <https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm611046.htm> [as of Sept. 18, 2018]; see 83 Fed.Reg. 34139 (July 19, 2018).)

Actions by Congress

27. Finally, since 2014, Congress has prohibited the United States Department of Justice from enforcing the Controlled Substances Act against state-sanctioned medical marijuana use. In a series of appropriations bills and short-term spending measures signed by the last two presidents, Congress has prohibited the federal Department of Justice from preventing state implementation of state medical marijuana

laws. The prohibition now in effect states:

> None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

(Consolidated Appropriations Act, Pub. L. No. 115-141, 115th Cong., 1st Sess., § 538, 132 Stat. 348, 444-445 (2018).)

28. The current prohibition will expire on October 1, 2018, at the end of this federal fiscal year, but it almost certainly will be replaced by a substantively identical prohibition for the 2018-2019 fiscal year. The United States Senate, with bipartisan support, has for the first time placed the prohibition directly into the appropriations act governing the Department of Justice. A House committee has agreed to do the same, and President Trump has announced that he agrees with the measure. (*Forbes Magazine*, "Senators Include Medical Marijuana Protections In Justice Department Bill,"

June 12, 2018 <https://www.forbes.com/sites/ tomangell/2018/06/12/senators-include-medical-marijuana-protections-in-justice-department-bill/#3ab235d16b2d>[as of Sept. 18, 2018].) The language of Section 538 of the pending appropriations bill is the same as the language of the previous riders, except for the number of states and territories affected. (March 21, 2018, Rules Committee Print 115-66, Text of the House Amendment to the Senate Amendment to H.R. 1625, § 538 < https://perma.cc/XQ34-E5Q5>[as of Sept. 18, 2018].)

29. In a definitive ruling in 2016, the Ninth Circuit held that the above appropriations language prohibits the federal drug law prosecution of any person whose conduct strictly complied with state medical marijuana laws. In *United States v. McIntosh*, *supra,* 833 F.3d 1163, the court consolidated ten interlocutory appeals and petitions for writs of mandamus arising out of orders entered by three district courts in two states within the circuit, all of which involved the appropriations rider. The Court held:

> At a minimum, [the appropriations rider] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.

(*Id.* at p. 1177.) The *McIntosh* court vacated the federal convictions before it, with this direction to the lower courts:

> If DOJ wishes to continue these prosecutions, Appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant

> conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana.

(*Id.* at p. 1179.)

30. *McIntosh* and the appropriations riders therefore prevent the federal drug law prosecutions of Mother, Student or Student's nurse in the 2017-2018 federal fiscal year and almost certainly the 2018-2019 federal fiscal year, because they "engaged in conduct permitted by the State Medical Marijuana Laws and . . . fully complied with such laws." (*McIntosh, supra,* 833 F.3 at p. 1177.) Those fiscal years include Student's kindergarten year. So even if their conduct did fall within the prohibition of the Controlled Substances Act, under current law there is no realistic prospect that they would be prosecuted for it.

C. The Unresolved Federal Legal Question

31. In light of all these developments undermining the central assumption behind the treatment of marijuana in the Controlled Substances Act, there are plausible ways that a modern court could interpret that Act not to prohibit the conduct examined here. Section 844 prohibits possession of a controlled substance "unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice." (21 U.S.C. § 844(a).) The evidence showed that Dr. Goldstein, Dr. Sullivan, the Kaiser physicians and the licensed vocational nurse were all practitioners within the meaning of the Controlled Substances Act. (21 U.S.C. § 802(21).)

32. The evidence showed that Dr. Goldstein's recommendation, Dr. Sullivan's support (which amounted to a recommendation) and the order contained in the emergency seizure protocol of the Kaiser treatment plan were all obtained while the

practitioners involved were acting as authorized by California law and in the course of their professional practices.

33. A modern federal court could easily find that the Kaiser emergency seizure protocol was a "valid . . . order" within the meaning of section 844, subdivision (a), of Title 21 of the United States Code. It was issued by California-licensed Kaiser physicians who had been treating Student most of her life. Dr. Goldstein's "recommendation" also could be construed as a "valid . . . order." A valid order does not have to be a formal prescription, or the statute would not distinguish between the two. Dr. Goldstein's recommendation was the strongest statement she could make without violating federal law. Dr. Sullivan's declaration, while more cautious, was clearly intended to support Student's use of THC oil to the extent he could legally do so.

34. In light of Congress's ongoing prohibition of prosecutions for state-sanctioned medical marijuana use, it is unlikely that any definitive federal court decision will resolve the interpretive question discussed above any time soon, if ever. As a result, whether Parent, Student, and the nurse would technically violate the federal law prohibiting possession of marijuana if Student were placed on a public school campus for her kindergarten year cannot be decided here with any certainty. Fortunately, the ultimate question here is not whether federal law prohibits Mother, Student and the nurse from possessing THC oil on Rincon Valley's campus; it is whether the IEP Rincon Valley offered Student met her unique needs and was reasonably calculated to provide her with educational benefit in in the least restrictive environment, thereby constituting a FAPE.

D. The April 27, 2018 iep offer of home placement did not provide student a fape, because it did not place her in the least restrictive environment and did not permit her to meet her annual goals

35. Both federal and state laws require a school district to provide special

education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398,1403; *Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

36. In *Sacramento City Unified Sch. Dist. v. Rachel H., supra*, 14 F.3d 1398, the Ninth Circuit set forth four factors that must be evaluated and balanced to determine whether a student is placed in the least restrictive environment: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Id.* at p. 1404.)[5]

37. Application of the *Rachel H.* standards here compels the conclusion that Student could satisfactorily be educated on Rincon Valley's public school campus. The evidence showed that, in preschool among many peers, Student derived significant academic benefit; she learned, for example, colors, letters, and some numbers, and made substantial progress on her goals. It also showed that Student derived a great deal of benefit from learning to socialize with her peers. Finally, it showed that even the emergency treatment of her seizures was not significantly disruptive for the students or

[5] Neither party addressed the cost of a home or school placement, so that factor is not considered here.

teachers of the class. Rincon Valley agrees that, putting aside the possibility of state and federal law violations, Student's least restrictive environment is among her peers on a campus.

38. Under California law, Rincon Valley's April 2018 IEP team decision to bar Student from its campus and bus was not reasonably calculated to provide her a FAPE in the least restrictive environment. (*Rowley, supra,* 458 U.S at pp. 203-204; *Endrew F., supra,* 137 S.Ct. at p. 1001.) As shown above, as long as Mother, Student and the nurse adhere to their previous practices at the preschool, Student's presence on campus and on the bus along with her medication would not violate California law.

39. The circumstances require Rincon Valley to resolve a conflict between federal statutes. The possibility that Student's presence with her medication on a campus and a school bus might embroil Rincon Valley in prosecution or controversy under federal drug law is remote and speculative. It is not the job of California political subdivisions to enforce federal drug law policy that conflicts with California law. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 762-763.) "[A] city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana." (*Ibid.*) The same is true of a school district.

40. The Ninth Circuit has supplied some guidance to school districts faced with the competing commands of federal law. In *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038 (*Doug C.*), a district had scheduled an annual IEP team meeting just in time to meet the IDEA's requirement that a meeting be held at least annually to consider the student's progress on his goals and make revisions if appropriate. (See 20 U.S.C. §1414(d)(4)(A)(i); 34 C.F.R. § 300.324(b)(1)(i).) The student's parent could not attend because of illness, and sought postponement to a later date. The district refused,

citing its obligation to hold the meeting within a year of the previous meeting, but the Ninth Circuit held that this choice denied the student a FAPE because it deprived parents of adequate participation in the IEP process. The Court announced this standard:

> When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE.

(*Doug C., supra,* 720 F.3d at p. 1046.) The Court then held, under that standard, that the district's choice to prefer the annual meeting requirement over the participation of the student's parents was clearly unreasonable and a denial of FAPE. (*Ibid.*)

41. Applying the *Doug C.* standard here, the only reasonable course of action Student's IEP team could have chosen in April 2018, was to comply with the least restrictive environment requirement, rather than a strict interpretation of Section 844 of the Controlled Substances Act. Section 844 has not been enforced against state-sanctioned medical marijuana use for years, and due to congressional command cannot be enforced by federal prosecutors. The force of that law, if any, is greatly outweighed by the competing federal law command, in the IDEA, that Student be given a FAPE in the least restrictive environment. In her case, that means education on a campus among her peers, and transportation to and from that campus. The former course would have promoted the purposes of the IDEA and was less likely to result in a denial of FAPE. The opposite choice, which Rincon Valley made, denied Student a FAPE.

42. The April 2018 IEP offer was also not reasonably calculated to benefit Student, because it did not even avoid the theoretical federal misdemeanor violation Rincon Valley fears. As noted above, several California statutes distinguish between drug

use on campuses and off campuses, but federal law does not. Section 844 of the Controlled Substance Act applies everywhere that federal law applies, and makes no distinction among locations. Section 844 is equally applicable to conduct on a campus, off a campus, or in a home. If the conduct examined here would violate Section 844 on a campus, it would also violate Section 844 under the proposed home-based IEP. Nor did Rincon Valley absolve itself of any theoretical involvement in the misdemeanor by proposing the disputed IEP; that offer would provide Student at home the same District-supported nursing services that she received in her private preschool, including possession and administration of THC oil as an emergency seizure medication. Thus, Rincon Valley's proposed IEP would just move the geographical location of the feared violation; it would not eliminate the violation or change the District's role in it.

43. The April 2018 IEP offer was additionally not reasonably calculated to benefit Student because it provided no mechanism for allowing her to accomplish several of her annual goals, which required interaction with other children. As the parties agree and the evidence showed, one of Student's most pressing unique needs is improvement in her ability to socialize with other children. Ms. Myhers speculated that, in order to address this need, the program specialist who would teach Student at home would make some effort to expose her to her peers, such as gathering groups of children from the neighborhood to substitute for the students otherwise present on the campus and during morning circle time. But nothing in the record shows that this was a practical or likely way to allow Student to accomplish her social goals, and an IEP cannot be defended by reference to possible additional services that go beyond its specific provisions. Such promises are not part of the IEP itself and are unenforceable. (*M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1198-1199.) Retrospective testimony about what would have happened had an offer been accepted must be limited to the actual provisions of the IEP. "Such testimony may not be used to

materially alter a deficient written IEP by establishing that the student would have received services beyond those listed in the IEP." (*R.E. v. New York City Dept. of Educ.* (2d Cir. 2012) 694 F.3d 167, 174.)[6]

44. Rincon Valley's argument that it would jeopardize federal funding by allowing Student on its campus with her medication is unpersuasive. Ms. Myhers, a lay witness, suggested the district might violate a federal law or guideline requiring a declaration that the district's campuses were drug-free, but Rincon Valley in its closing brief cannot cite any specific law, rule, or regulation that requires such a declaration, so the argument cannot be accepted here. Ms. Myher's opinion, which was admitted over a relevance objection, was admissible to establish the reasons for Rincon Valley's offer, but not to establish what the law actually is. (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1176; *Summers v. A.L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, 1178-1184.)

45. Rincon Valley argues that it is required by the federal Drug-Free Workplace Act of 1988 (41 U.S.C., §§ 8103 et seq.) to agree to provide a drug-free workplace as a condition of receiving federal money. That Act requires the recipient of a federal grant to notify its own employees that the "unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace . . ." (41 U.S.C. §8103(a)(1)(A)). But as shown above, the conduct examined here is lawful under state law, and it is far from clear that it is unlawful under federal law. The Drug-Free Workplace Act is a system of notifications, not prohibitions, and it applies to those who receive "a grant from a federal agency," which for educational purposes is defined by regulation as including only "an assistance award from the Department of

[6] Student also argues that Rincon Valley's proposed IEP violated the Americans With Disabilities Act, but that claim is not addressed here because OAH has no jurisdiction over it.

Education . . ." (34 C.F.R. § 84.105(a)(1).) Rincon Valley does not address whether special education funding is an "assistance award" with the meaning of that provision. That is unlikely, because the Department of Education does not award special education funding; that funding is established and primarily regulated by Congress. (See 20 U.S.C. §§ 1407, 1411-1412.)

46. Moreover, the Drug-Free Workplace Act is wholly focused on preventing drug abuse by a grantee's employees, a concern that does not arise here, both because there is no potential for abuse of the THC oil as presently administered and because the nurse is not Rincon Valley's employee. In any event, the prospect that the federal government would deprive Rincon Valley of federal funding for allowing Student on its campus with her life-sustaining seizure medication seems even more remote than the likelihood that it would charge Student, Mother, the nurse, or school officials with crimes. And should these extraordinarily unlikely contingencies arise, Rincon Valley would have ample time to seek administrative, legislative or judicial relief.

47. Rincon Valley was aware, in fashioning the disputed IEP offer, that Student had succeeded in two years on a preschool campus while having her medication and her nurse available in case of seizures. It placed her there and paid for her education and her nurse. Rincon Valley has already risked federal misdemeanor prosecution without incident, and should have reasonably concluded that it could continue to do so. If circumstances or law change, the parties can address that change in a new IEP. For now, however, it is not reasonable for Rincon Valley to exclude Student from its campus and bus out of theoretical concern for a federal law that is at present unenforced and unenforceable. Rincon Valley's failure to offer Student a placement on a campus among her peers denied her a FAPE because it did not place her in the least restrictive environment in which she could satisfactorily be educated and did not adequately allow her to achieve her annual goals.

ORDER

1. Rincon Valley's April 27, 2018 IEP offer failed to offer Student a FAPE in the least restrictive environment.

2. Within 30 days of this Decision, the parties shall convene an IEP team meeting to place Student on a public school campus among her peers with her emergency seizure medication available, and allow her and her nurse to travel on a public school bus to and from the school and on field trips with her medication. Until the parties reach agreement on and implement such an IEP, Student shall be allowed on the campus and the school bus under the same terms as set forth in the stay put order of July 18, 2018.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the issue decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: September 21, 2018

/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings

Letters of Public Comment

BRN Board Meeting | February 16-17, 2022

To Ms. Loretta Melby RN, MSN
Executive Officer
Board of Registered Nursing
Department of Consumer Affairs

Ms. Melby:

My name is Lavonne Pryor, I am a RN currently employed with the **California Department of Corrections. I have worked in corrections for 20+ years.** I have been a RN since 1999.
My apologies for my late response. I just returned from my vacation and saw this email from the BRN. If I may respond; I do not feel or believe the nurse who administers medicinal marijuana to a patient/student on campus commits misconduct. Especially if the medicine or drug has been prescribed by a licensed provider. Other countries are far more advanced in holistic medicine then Western Civilizations. Marijuana is a drug with medicinal purposes which has been historically overlooked. Marijuana just like other drugs; cocaine, morphine, heroine, and alcohol which are derived from natural sources can be made for street purposes, and traded illegally. I think the decision to give the prescribed medicine hinges solely on the providers discretion. Does the patient need the medicine? Or will the patient benefit from the medicine? This can only be answered by the patient and provider. I think for a nurse withholds a patient, their much needed medication should be considered a delay in the access to care, and a derelict of duty by the nurse. I also feel medicine in general needs to get back to its roots. By "roots" I mean usage of what is grown naturally from earth, instead of these laced variants which are dangerous. Synthetic or man-made drugs like fentanyl can be lethal if taken in large quantities.

Lastly, a nurse who works directly under a physician's license should have the autonomy to administer medication to a patient, not prescribe a medication, but administer a medication. If a panel is selected, I would like to be chosen to represent in favor of dosing student/patients prescribed medicinal marijuana.

If you have any further question or concerns please contact me

Respectfully,

L. Pryor SRN II

LaVonne B. Pryor SRN II
Supervising Registered Nurse II
B YARD
California State Prison-Los Angeles County
(661) 729-2000 ext 7117
(661) 709-5610 Cellular
25 years state service
lavonne.pryor@CDCR.ca.gov

December 30, 2021

Regarding *NOTICE OF DECLARATORY DECISION PROCEEDING*

Does a registered nurse commit misconduct subject to disciplinary action when the nurse administers medicinal cannabis to a qualified patient student on a school campus pursuant to a physician's care plan?

Senate Bill No. 223
CHAPTER 699

An act to add Section 49414.1 to the Education Code, relating to pupil health.

[Approved by Governor October 09, 2019. Filed with Secretary of State October 09, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

SB 223, Hill. Pupil health: administration of medicinal cannabis: schoolsites.

Existing law authorizes a school nurse or other designated school personnel to assist any pupil who is required to take, during the regular school day, medication prescribed for the pupil by a physician and surgeon or ordered for the pupil by a physician assistant, if the school district receives specified written statements from the physician and surgeon or physician assistant and from the parent, foster parent, or guardian of the pupil.

...The bill would authorize the policy to be amended or rescinded for any reason at a regularly scheduled meeting, as specified, and for exigent circumstances at a special meeting, as specified. The bill, for pupil records collected for the purpose of administering medicinal cannabis, would require those records to be treated as medical records and subject to all provisions of state and federal law governing the confidentiality and disclosure of medical records.[1]

vs.

The 58 California counties and 482 localities and cities within these 58 counties are currently updating and establishing local policies on Cannabis[2] with a number still exhibiting 'banned' or 'illegal' laws.

vs.

To date, the agency [FDA[3]] has not approved a marketing application for cannabis for the treatment of any disease or condition. FDA has, however, approved one cannabis-derived and

[1]https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB223
[2]http://cannabusinesslaw.com/CALIFORNIA-CANNABIS-LAWS-BY-COUNTY/
[3] https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd

three cannabis-related drug products. These approved products are only available with a prescription from a licensed healthcare provider.

The Nursing profession in the State of California exists in a fickled state, existing between Federal, State, County, and City/Municipality/unincorporated morass of laws and regulations which place the registered nurse, for the purposes of the proposed *NOTICE OF DECLARATORY DECISION PROCEEDING* in a precarious position of practicing safely in some districts while facing misconduct subject to disciplinary action in another with school districts often crossing jurisdictional lines in order to address available student caches.

Clarification of the myriad of laws and regulations is essential to the clarification and implementation of current healthcare plans when medication providers and parental/guardians under certain regulations, are not themselves available to provide for the administration of medicinal cannabis and a registered nurse is present and capable of implementing the physician's care plan.

Kevin Vejar, PHN, MSN, PMHN-BC
CA RN 348554, CA PHN 50397

[1]https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB223
[2]http://cannabusinesslaw.com/CALIFORNIA-CANNABIS-LAWS-BY-COUNTY/
[3] https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd

Ken Sobel, Esq.
Vice President, Genesis International Cannabis Solutions, Inc.
Co-Founder, Cannabis Nurse Network
Former President, Grossmont College Foundation
Licensed Attorney and Counsel in Arizona & California Since 1980
Practice Limited to Medical & Adult Use Commercial Cannabis Licensing & Operations
All Aspects of Cannabis and Hemp Law, Business, Policy & Patient Advocacy

email: [redacted]
cell: [redacted]

January 6, 2022

Loretta Melby, RN MSN
Executive Officer
Board of Registered Nursing
Department of Consumer Affairs
1747 N. Market Blvd., Suite 150
Sacramento, CA 95834-1924

RE: **Request by Cannabis Nurse Network to Submit Written Comments to the Board Pursuant to California Administrative Code Section 1280 In Connection with the Application for Declaratory Decision by Applicant Nevada Joint Union High School in Reference to Whether a School Nurse Should Be Allowed to Administer Physician-Approved Medical Cannabis to A Special Needs Student.**

Dear Ms. Melby:

Please consider this as a Request to Submit Written Comments pursuant to section 1280 of the California Administrative Code (1CA ADC § 1280) With Regard to the above-referenced Application for a Declaratory Decision ***in support of the proposition that California school nurses may administer physician-approved medical cannabis to a special needs student pursuant to 1 CA ADC §1280.***

Our organization, the Cannabis Nurse Network (CNN), was founded by Nurse Heather Manus, RN, in 2015. Our mission is to provide professional services including education and support to thousands of nurses nationwide who are involved in the care and treatment of patients using cannabis for medical purposes. Nurse Heather was the first RN in the US to serve in a fully integrated cannabis nursing role, with extensive experience in providing endocannabinoid system care and bridging knowledge gaps within the professional nursing community. CNN provides accredited continued education courses for nurses who wish to become educated in the science of endocannabinoid care, including minors.

In addition, your undersigned, Ken Sobel, an AV rated attorney licensed to practice in California and Arizona, and before all federal courts in both states, is a leading expert on all issues relating to cannabis law and policy and has taught nurses on the subject of standards of care in connection with the recommendation and delivery of cannabis medicine. Your undersigned litigated the issue of whether cannabis should be added as a new qualifying condition in Arizona before an Administrative Law Judge who agreed to a reasonable degree of scientific certainty that cannabis was safe and effective in treating Post Traumatic Stress Disorder (PTSD) and ordered that the Department of Health Services add PTSD as a qualifying condition for the use of medical cannabis.

In addition, CNN, and Mr. Sobel, helped in drafting and advocating for Ryan's Law in the last California legislative session. The bill passed both chambers with only 1 dissenting vote and was signed by Governor Newsom on September 28, 2021 and became effective on January 1st. Ryan's Law provides that all California hospitals and healthcare facilities (with few exceptions) the legal obligation to allow terminally ill in-patients to use medical cannabis. [In the course of pursuing this legislation, we produced an email from the administrator for the Centers for Medicare and Medicaid Services declaring that the federal government had never sought to disqualify healthcare organizations that allow a patient's use of cannabis from reimbursement on that basis alone].

Our written statement in support of the Application is as follows:

1. The Applicant has carefully and thoughtfully presented accurate information on the legalization of cannabis. In addition, we would add the following:

- In *Conant* v. *Walters* 309 F.3d 629 (9th Cir. 2002) the 9th Circuit Court of Appeals upheld a District Court's decision that healthcare providers have a First Amendment right to recommend medical cannabis to their patients.
- In *City of Garden Grove* v. *Superior Court*, 157 Cal. App. 4th 355 (2007) the court upheld California's right under the Controlled Substances Act to legalize cannabis for medical purposes. Subsequently, the US Supreme Court denied certiorari.
- As mentioned in Applicant's Brief, "[s]ince 2014 the United States Department of Justice ("DOJ") has been prohibited from using congressionally apportioned funds to prevent California's implementation of its medical cannabis laws." Subsequently, in 2015, in *US* v. *Marin Alliance for Medical Marijuana*, 139 F. Supp. 3d 1039 (ND Cal. 2015), US District Court Judge Charles R. Breyer (the younger brother of US Supreme Court Justice Stephen Breyer) upheld the congressional prohibition and refused to allow the US government to seek a forfeiture against one of California's oldest cannabis dispensaries. The US government later abandoned its appeal. Under well-recognized principles of legal estoppel, under the current circumstances, the federal government would likely be prevented from penalizing a school nurse who assists in the delivery of a student's medical cannabis provided the use of medical cannabis is otherwise authorized under state law pursuant to the congressional ban and the holding of US v. MAMM, above.
- On or about December 3, 2020, the US Congress passed the MORE Act that would, among other things, de-schedule marijuana from the Controlled Substances Act. Although the US Senate did not act on the MORE Act, it has been re-submitted in both houses for action in 2021-22.
- On or about December 4, 2020, the World Health Organization voted to de-schedule cannabidiol (CBD) and voted to re-schedule tetrahydrocannabinol (THC) from Schedule IV (most restrictive) to Schedule I (least restrictive). The United States government voted affirmatively for such actions.
- In 2020, Governor Newsom signed into law Senate Bill 223 also known as "JoJo's Bill" which allows California schools' governing boards to enact policies that enable a student's parent or caregiver to administer medical cannabis on school grounds.
- Since 2002 the US Government has held a patent for the medical use of cannabis. US Patent No. 6,630,507 proves that cannabis can be used as an antioxidant to treat stroke, autoimmune disorders, age-related issues and as a neuroprotectant, among other things.
- Since around 1986 scientists have known about the human endocannabinoid system or eCS. It is the largest receptor-based signaling system in the human body. The body produces anandamide which is the chemical equivalent to THC. It is often referred to as the 12th system of the human body and serves to create homeostasis between all other body systems. THC from the plant, for example, essentially serves as a nutritional supplement to the body's eCS system. It is often referred to by experts as a "gentle plant medicine." In 5,000 years, there has never been a confirmed case of overdose death caused by consumption of cannabis.

2. The American Nurses Association has published position statements supporting the medical use of cannabis for over two decades and encourages nurses to take an active role in supporting safe access and use. "ANA has supported providing safe access to therapeutic marijuana and related cannabinoids for over 20 years. In 1996, ANA's Congress on Nursing Practice supported research and education for evidence-based therapeutic uses of marijuana and related cannabinoids. In addition, the ANA House of Delegates has gone on record as supporting nurses' advocacy for patients using marijuana and other related cannabinoids for therapeutic use (ANA, 2003)." ANA's position in support of **Therapeutic Use of Marijuana and Related Cannabinoids** has been updated 3 times (2003, 2008, 2016) with the current position stating, **"Exemption from criminal prosecution, civil liability, or professional sanctioning, such as loss of licensure or credentialing, for health care practitioners who discuss treatment alternatives concerning marijuana or who prescribe, dispense or administer marijuana in accordance with professional standards and state laws."**

3. The National Council State Boards of Nursing (NCSBN) has encouraged state boards to allow nurses an expanded role in educating and administering cannabis medicine by publishing guidelines for nurses, students, and APRNs. The July 2018 Supplement to the Journal of Nursing Regulation (JNR) contains the "NCSBN National Nursing Guidelines for Medical Marijuana." This body of work fills the gap in the literature on the nursing care of patients using medical marijuana and provides evidence-based nursing guidelines. The JNR supplement covers:

- Current Legislation, Scientific Literature Review, and Nursing Implications
- **Nursing Care of the Patient Using Medical Marijuana**
- Medical Marijuana Education in Pre-Licensure Nursing Programs
- Medical Marijuana Education in APRN Nursing Programs

4. Cannabis Nurse Network has worked with thousands of nurses throughout the world in understanding the use of cannabis medicine, including with school-age children. The subject of school nurses administering cannabis medicine to qualifying students is not a new discussion. Colorado passed HOUSE BILL 18-1286 "Quintin's Law" in 2008, expanding upon HOUSE BILL 16-1373 "Jack's Law" allowing students to use non-smokable cannabis medicine administered on school grounds. "(III) (A) SUBJECT TO THE REQUIREMENTS SPECIFIED IN SUBSECTIONS (3)(d.5)(I) AND (3)(d.5)(II) OF THIS SECTION, SCHOOL PERSONNEL MAY POSSESS, AND ADMINISTER TO A STUDENT WHO HOLDS A VALID RECOMMENDATION FOR MEDICAL MARIJUANA, MEDICAL MARIJUANA IN A NONSMOKEABLE FORM UPON THE GROUNDS OF THE PRESCHOOL OR PRIMARY OR SECONDARY SCHOOL IN WHICH THE STUDENT IS ENROLLED, OR UPON A SCHOOL BUS OR AT A SCHOOL-SPONSORED EVENT."

5. Well trained school nurses are in the best position to assist in supervising and administering medical cannabis to qualified patients, including those with special needs as presented in this Application. The barriers identified by school nurses include their uncertainty related to a lack of knowledge regarding endocannabinoid system care and cannabinoid therapeutics, and insecurity and confusion regarding state nursing board positions and clarification regarding scope of practice related to new state laws.

6. The National Association of School Nurses ("NASN") has issued a Position Statement that supports the NCSBN Guidelines, discussed above, and further encourages all of its members to be knowledgeable in:

- The current state of legalization of cannabis...in their jurisdiction
- The human endocannabinoid system (eCS), cannabinoid receptors, cannabinoids and the interaction between them
- Cannabis pharmacology and research

- How to identify the safety considerations for patient use of cannabis, and cautions the nurse to "approach the student and family without judgment regarding their choice of treatment or preferences.

7. Since 2015, ***Cannabis Nurses Network has provided in-depth information, education, support, and guidance to help nurses understand all of the principles set forth above and the nature and effectiveness of cannabis medicine, and how to safely supervise the use by patients in accordance with state law.*** CNN stands ready to assist school nurses throughout California in the necessary education and training to build competence and confidence through on-line or in-person seminars including CEUs. www.CannabisNursesNetwork.com

We, the declarants whose signature appears below state as follows:

The contents herein are true and made of our own personal knowledge and, if called as a witness to testify, we could competently testify as to each such fact.

Dated: January 4, 2022

By: _____
Heather Manus, RN

By: _____
Ken Sobel, Esq.
California State Bar #95954 (1980)
Arizona State Bar #06551 (1980)

If you need any additional information or resources, or would like oral testimony by phone or zoom meeting, please do not hesitate to contact me.

Heather Manus, RN
Ken Sobel, Esq.
[redacted]
E-mail: [redacted]
Cell: [redacted]
Cc: Michael J. Davison, Esq @ mdavis@aalrr.com (Attorney for Applicant)
Cc: Reza Pejuhesh, Esq. @ reza.pejuhesh@dca.ca.gov (Attorney for CA Dept. of Consumer Affairs)

State of California Board of Registered Nursing
P.O. Box 944210
Sacramento, CA 94244-2100

January 7, 2022

Attention: Board's Executive Officer, Loretta Melby

I am writing to provide context and content to the Board of Registered Nursing regarding the notice posted on, 12/30/2021, pertaining to a registered nurse administering medicinal cannabis to a qualified patient student on a school campus under a physician's care plan.

Does a registered nurse commit misconduct subject to disciplinary action when the nurse administers medicinal cannabis to a qualified patient student on a school campus pursuant to a physician's care plan?

Emphatically NO, the nurse does not commit misconduct subject to disciplinary action. To limit any child's academic learning on a school campus solely because of a refractory illness is cruel and unusual punishment.

Cannabis formulations, prescribed until prohibition in 1937, have been legally returned to medical patients in 37 US States. Cannabidiol (CBD), an approved Schedule V, FDA pharmaceutical as Epidiolex, is prescribed for refractory seizures. CBD carries efficacy as a botanical formulation as well, available in dispensaries and CBD stores.

Medicinal cannabis provides relief from the symptoms of autism, epilepsy, autoimmune, cancer, and behavioral illness, often with better efficacy and fewer side effects than the pharmaceuticals. A 12/2021 review of numerous studies as well as new research from UCSD proves families are benefiting from these medicines, and should remain in a school setting as long as possible.

To propose disciplinary action against registered nurses who administer medicinal cannabis is wrong, since the NCSBN gave us guidelines for preforming this task. RNs help these children leave home and learn in a school environment by utilizing botanical formulations of plant medicine to treat their various complicated medical conditions.

As an alumni of the University of Connecticut School of Nursing class of 1966, a graduate of Teachers College Columbia University class of 1976, and fifteen years' experience treating patients as a certified hospice and palliative nurse under the tutelage of a hospice medical director, it is ludicrous to propose disciplinary action against a registered nurse who follows the orders of a physician pursuant to a patient care plan - solely because the medication in question is medicinal cannabis. We must not allow stigma and bias against these defenseless children to exist any longer.

Sincerely,

Ruth A Hill RN BSN MAT CHPN (RN345260)

[redacted]

January 16, 2022

Regina Goss, RN
[redacted]

To whom it May Concern,

Dear BRN members, I received a notice of declaratory decision proceeding regarding disciplinary action of an RN and cannabis administration. I attached a copy to this response letter.
I did try to contact Reza Pejuhesh by email for more information but did not receive a response. So based off this solo question with limited information, my response is as follows.

The question presented in the notice is:

Does a registered nurse commit misconduct subject to disciplinary action when the nurse administers medical cannabis to a qualified patient student on a school campus pursuant to a physician's care plan?

My opinion is no, the RN is abiding by a physicians care plan and therefore should not be disciplined for doing so.
The ANA has supported providing safe access to therapeutic marijuana and related cannabinoids for over 20 years.
My personal experience involves several friends battling cancer where cannabis helped control nausea, vomiting and weight loss. A form of cannabis also helps a friend with a seizure disorder. My Orthopedic physician (Santa Barbra Alta Orthopedics) have brochures on the lobby desk advertising CBD ointments for sale, used for pain control.
As a working nurse, I interview patients who suffer with chronic pain and they state they have stopped using OxyContin and other opioids, switching to a form of CBD or THC to help manage their pain. I hope more medical studies will be done on these topics.

The nursing profession holds that health is a universal right, which includes access to safe healthcare and education concerning the prevention of health issues. The BRN should support the states that have voted to legalize marijuana and cannabinoids for medical, therapeutic treatment of patients who benefit from the use of cannabis and it's products prescribed by physicians.

Thank you for reading my response. I am interested in the results of your decision.

Best regards,

Regina Goss RN
[redacted]

TheGreenCross®

January 20, 2022

Dear Board of Registered Nursing,

I am writing today on behalf of The Green Cross, a San Francisco-based cannabis dispensary established in 2004. The Green Cross has always maintained strict adherence to state law and local regulations. In fact, in 2007, The Green Cross was awarded San Francisco's first medical cannabis dispensary (MCD) permit. Our A+ rating and full accreditation by the Golden Gate Better Business Bureau (BBB) underscores our outstanding record of compliance and commitment to incorporate operational standards that ensure integrity and accountability.

It was recently brought to our attention that the Board of Registered Nursing is currently reviewing an application regarding a nurse's right to administer medicinal cannabis to qualified patient students on a school campus pursuant to their physician's care plan without risk of disciplinary action. I write today to strongly urge the Board to support any measures that will allow nurses to administer cannabis without fear of potential misconduct claims.

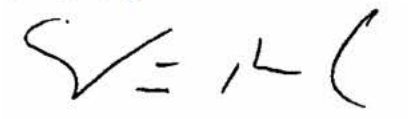
Cannabis has proven medicinal benefits. There have been countless scientific studies highlighting the therapeutic properties in cannabis, and how treatment has aided patients many different ailments. The science is there to back this up, and with the growing number of states passing adult-use and medical cannabis legislation, it appears the rest of the country is beginning to support and recognize the many healing properties of medicinal cannabis.

It is extremely vital for student patients to have safe access to medicinal cannabis, especially when diagnosed with conditions that limit their physical or mental capacities, such as ALS, Epilepsy and Seizures, Glaucoma, MS, muscle spasms, severe and chronic pain, or nausea. In some cases, it is medically necessary for the medicine to be administered by licensed nurses under the supervised care of their doctors.

Nurses need to feel protected by their employers, and able to provide comprehensive care to their patients without fear of punishment. I hope the Board will take our organization's recommendation into strong consideration when making a determination on this important matter.

If you have any questions or concerns, please feel free to contact me directly at (415) 846-7671 or KevinReed@TheGreenCross.org. Thank you again for your time and consideration.

Sincerely,



Kevin Reed
Founder & President
The Green Cross

4218 Mission Street
San Francisco, CA 94112

TheGreenCross.org

O: 415.648.4420
F: 415.431.2420

John Kell, RN, CSN
Arcata High School
1720 M St
Arcata, CA 95521

21st January 2022

BOARD OF REGISTERED NURSING
PO Box 944210, Sacramento, CA 94244-2100

To whom it May concern,

It is extremely important that we allow School Nurses on public school campuses to follow a medical doctor's orders to deliver a cannabis-derived product to a student in need. In my opinion the most common current pharmaceuticals carry much greater risk to both the end user as well as anybody who were to take it accidentally including accidental exposure to nursing and medical staff. There's also a lot of concern, I hear from parents, about exposure to benzodiazepines and long-term effects on their children. I do not know of the same concerns when it comes to cannabis-derived products.

I find no issue with storing or delivering a cannabis-based product to my students. Please consider removing the risk of misconduct for any registered nurse to administer medical cannabis to qualified students on a campus pursuant to a physician's care plan. If possible it would also be helpful to have guidance on labeling and storage.

Thank you.

Sincerely,

John Ralph Kell III, RN, CSN

License # RN95169202

Department of Cannabis Control
CALIFORNIA

Gavin Newsom
Governor

Nicole Elliott
Director

January 24, 2022

Board of Registered Nursing
747 North Market Blvd., Ste. 150
Sacramento, CA 95834

Re: Notice of Declaratory Decision Proceeding

To the Board of Registered Nursing:

The Department of Cannabis Control is committed to building a safe, sustainable, and equitable cannabis industry—a cannabis industry that works for all Californians. Consistent with that mission, we write to highlight the importance of access to medicinal cannabis, and to encourage the Board of Registered Nursing to find ways to facilitate such access—including by qualified patients who are also students.

Medicinal cannabis has long played a vital role in meeting Californians' medical needs. When the voters approved Proposition 215 in 1996, they affirmed what patients themselves had long experienced: medicinal cannabis can provide certain patients with much-needed therapeutic benefit. In the intervening decades, countless patients in California and around the world (in states and countries that have followed California's example) have relied on medicinal cannabis to manage pain, reduce inflammation, prevent vomiting, enhance appetite, soothe spasms, calm seizures, and provide myriad other forms of relief. Access to medicinal cannabis is vital to the health and well-being of qualified patients who rely on it.

Qualified patients' access to medicinal cannabis is no less important when those qualified patients are students. Facilitating students' access to medical cannabis is important to ensuring that California schools can meet the medical needs of students entrusted to their care—and to ensuring that students are not denied their fundamental right to an education because of those same medical needs. Consistent with these goals, state law has extended medicinal-cannabis access to qualified-student patients, by authorizing school governing bodies to adopt policies allowing a parent or guardian to administer medicinal cannabis to a qualified-patient student. (See Educ. Code, § 49414.1.)

The issue before the Board provides an opportunity to reinforce this progress. Allowing licensed nurses to administer medicinal cannabis—pursuant to a physician's care plan—can help

ensure that such administration occurs in a manner that is safe, professional, and consistent with that care plan. Moreover, allowing licensed nurses to participate in this process is consistent with California's commitment to equity. Not all students have parents or guardians who can take time during the workday to serve as their child's medical caregiver—but a student's socioeconomic or familial status should never prevent that student from receiving the medical care they need.

For all of these reasons, although we of course defer to the Board's understanding of the laws it administers, we encourage the Board to err on the side of interpreting California law to allow licensed nurses to administer medicinal cannabis to qualified-patient students.

Finally, we also encourage the Board not to be dissuaded by the ongoing criminalization of cannabis under federal law. Under the U.S. Constitution, federal law may not dictate whether and how states regulate cannabis-related activities: the Constitution does not allow federal law to "direct[] the States either to enact or refrain from enacting a regulation of the conduct of activities occurring within their borders. (*Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018).) And, as federal judges have long recognized—including in the context of California's medicinal-cannabis laws—the relationship between health care providers and their patients "is an area that falls squarely within the states' traditional police powers." (*Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring).) In this light, we encourage the Board to exercise its regulatory authority in a manner that furthers California's values and meets Californians' medical needs, consistent with California law—even if federal law would not achieve that same result.

Thank you very much for your attention to this important issue. We are deeply grateful for your work to build a nursing profession that works for all Californians, including those Californians who rely on medicinal cannabis.

Sincerely,

Nicole Elliott
Director
Department of Cannabis Control

Annette Acosta
[redacted]

Ms. Loretta Melby, Board Executive Officer
Board of Registered Nursing
PO Box 944210
Sacramento, Calif
94244-2100

January 25, 2022

RE: Response to notice of Declaratory Decision Proceeding dated December 30, 2021.

Dear Ms. Melby,

I appreciate the opportunity to provide comments related to the administration of medicinal cannabis by a school nurse.

Any action would depend on the local facility policies and procedures for medicinal cannabis (MC) and any related California Board of Registered Nursing standards. I pose the following questions:

1. Does MC fall under controlled substances? If so, what are the related policies?
2. Was there appropriate education to front line medical and nursing staff on the prescribing and administering of MC?
3. Is the process for prescribing and administering MC the same as other medications?
4. What are the policies and procedures if the physician includes MC in the care plan? Should there have been an order or is the inclusion of MC in the care plan sufficient?
5. Does the California Board of Registered Nursing have any standards related to the administration of MC? If so, how do they apply to the question?

There are many variables to consider before submitting a nurse to disciplinary action for administering MC, especially if this is a new process and if the nurse was new to the clinic or just a new nurse. Again this would depend on the local policies and procedures for progressive warnings and disciplinary actions.

Please note I did send an email response yesterday with comments and received a return response indicating that if I sent a written response post-marked by today, it will be accepted.

Respectfully

Annette Acosta

Annette Acosta, MN, RN