STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY • GAVIN NEWSOM, GOVERNOR.
Board of Vocational Nursing and Psychiatric Technicians
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October 6, 2021

Michael J. Davis, Esq.
Atkinson, Andelson, Loya, Ruud & Romo
1050 Northgate Drive, Suite 520
San Rafael, CA 94903

Re: Medicinal Cannabis Administration by Licensed Vocational Nurses Public Schools

Dear Mr. Davis:

The Board of Vocational Nursing and Psychiatric Technicians (Board) received your request for scope of practice guidance on the administration of medicinal cannabis by a licensed vocational nurse (LVN) in a California public school under the facts and the circumstances specified in the request. The facts and the circumstances surrounding the administration of medicinal cannabis by the LVN specified in the request are as follows:

1. A minor student attends a public school in California. The student has been diagnosed with a severe seizure condition. The student's physician has recommended that the student be administered two cannabis medications to treat the severe seizure condition: a CBD:THC tincture administered as a maintenance medication and a THC intranasal spray administered as a rescue medication upon the onset of a seizure.

2. Due to the severe seizure condition, the student receives special education services from the school. These services are formalized in an individualized educational program (IEP) developed specifically for the student by a multidisciplinary team which includes school administrators, student, parents, and health professionals. As part of the IEP, the multidisciplinary team has determined that the student requires access to nursing services to assist with administration of the recommended medications during the school day.

3. At school, the recommended medications are administered by an LVN under the general direction of a physician or registered professional nurse (RN). The LVN has been trained in and is familiar with the signs and symptoms of the onset of a seizure in the student and the proper administration of the rescue medication. During the school day, a physician or RN is available to the LVN to provide further direction or answer any questions.

4. The school district employing the LVN to care for the student inquires whether, under these circumstances, the LVN would commit professional misconduct subject to disciplinary action by administering medicinal cannabis to the student at the school during school hours pursuant to a physician's order, recommendation, or care plan.

Under these circumstances, the LVN would not commit professional misconduct subject to disciplinary action by administering medicinal cannabis to the student at the school during school hours pursuant to a physician's order, recommendation, or care plan. The Vocational Nursing Practice Act, Business and Professions Code chapter 6.5, sections 2840 et seq., governs the scope of practice for vocational nursing. Business and Professions Code section 2859 defines the practice of vocational nursing as follows:

> The practice of vocational nursing within the meaning of [chapter 6.5] is the performance of services requiring those technical, manual skills acquired by means of a course in an accredited school of vocational nursing, or its equivalent, practiced under the direction of a licensed physician or registered professional nurse[.]

Thus, under this code section, the LVN practices only under the direction of a physician or RN. The direction provided by the supervising physician or RN must be sufficient to enable the LVN to safely and efficiently perform those services within the LVN scope of practice. The supervising physician or RN need not be physically present when providing direction to the LVN but must be reasonably available to the LVN while the LVN performs services within the LVN scope of practice.

The Board has, pursuant to its rulemaking authority, promulgated regulations relating to vocational nursing. These regulations, which can be found in Title 16, Division 25 of the California Code of Regulations (CCR), further define the scope of practice for vocational nurses. Specifically, section 2518.5 of these regulations states:

> The licensed vocational nurse performs services requiring technical and manual skills which include the following:
>
> (a) Uses and practices basic assessment (data collection), participates in planning, executes interventions in accordance with the care plan or treatment plan, and contributes to evaluation of individualized interventions related to the care plan or treatment plan.
>
> (b) Provides direct patient/client care by which the licensee:
>
> (1) Performs basic nursing services as defined in subdivision (a);
>
> (2) Administers medications;

(3) Applies communication skills for the purpose of patient/client care and education; and

(4) Contributes to the development and implementation of a teaching plan related to self-care for the patient/client.

Thus, under this regulation, the LVN scope of practice includes executing interventions in accordance with the care plan or treatment plan for a patient, performing basic nursing services and administering medications. When implementing a care plan or treatment plan, including those incorporated into an IEP, the LVN may only perform those services and execute those technical or manual skills within their scope of practice. A care plan or treatment plan may not expand the scope of practice and the scope of practice remains the same regardless of the healthcare setting in which the LVN provides services.

When ordered by a physician, the LVN may administer medicinal cannabis to a patient in a manner consistent with the order and may administer rescue medication if the order provides specific instructions and the LVN receives specific direction on the circumstances under which the rescue medication is to be administered from a physician or registered professional nurse. The LVN may administer medicinal cannabis to a public school student as part of an IEP if these conditions are met and, provided the medicine is otherwise administered as ordered and directed, the LVN would not commit professional misconduct subject to disciplinary action by administering the medicinal cannabis. In addition, to the extent the LVN performs the act of administering medicinal cannabis to a student as described in the physician's order or care plan, the Board may be precluded from penalizing or taking disciplinary action against the LVN based solely on the act of administering the medication under the provisions of Health and Safety Code section 11362.8.

If you have any further questions, please do not hesitate to contact me.

Marie Cordeiro, MN, RN
Supervising Nursing Education Consultant

[NOTE: This document is not to be interpreted, construed, or otherwise considered to be a "declaratory decision" as that term is used in Government Code sections 11465.10 through 11465.70.]

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September 17, 2021

VIA EMAIL TO ELAINE.YAMAGUCHI@DCA.CA.GOV

Elaine Yamaguchi
Executive Officer
Board of Vocational Nurses & Psychiatric Technicians
Department of Consumer Affairs
2535 Capitol Oaks Drive, Suite 205
Sacramento, CA 95833-2945

Re: Request for Opinion

Dear Ms. Yamaguchi,

This Firm represents a public school district that employs licensed vocational nurses for the provision of pupil health services. These services include the administration of medication pursuant to Education Code, section 49423. A question has arisen concerning the scope of practice of licensed vocational nurses and we are writing to request that the Board of Vocational Nursing and Psychiatric Technicians consider the question and provide its guidance.

I. Question

Does a licensed vocational 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?

II. Executive Summary

A high school student in one of our client school districts ("Student") 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.)

The scope of practice of a vocational nurse "is the performance of services requiring those technical, manual skills acquired by means of a course in an approved school of vocational nursing, or its equivalent, practiced under the direction of a licensed physician, or registered professional nurse…" (Bus. & Prof. Code § 2859.) This scope includes executing interventions in accordance with the care and treatment plan and to provide direct patient care by administering medication. (Cal. Code Regs. tit. 16, § 2518.5.) As with registered nurses, vocational nurses are subject to discipline for unprofessional conduct, including incompetence and gross negligence. (Bus. & Prof. Code § 2878.)

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 licensed vocational nurse ("LVN") is not subject to discipline for acting as a primary caregiver. (*Id*.)

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

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 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. LVNs who competently and professionally implement these 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. Further Analysis Available Upon Request

Cannabis law is a nuanced and evolving body of law that involves interrelated state and federal law and regulation. In order to make the most efficient use of the Board's time, we are willing to provide further analysis relative to the school setting in order to provide the Board with a starting point for its own review and analysis. If this would be helpful to the Board, please so indicate and we would be glad to provide such information.

IV. Requested Action

To resolve the outstanding questions faced by districts and the licensed medical professionals they employ—and because this is an issue of general applicability which is likely to reoccur—we request:

1. An informal opinion by a Nursing Educational Consultant answering the Question posed herein;

2. Review of the Nursing Educational Consultant Opinion by the appropriate Board Committee, resulting in a recommended precedential action by the Board; and

3. Consideration of the Question by the Board of Vocational Nursing and Psychiatric Technicians and issuance of a formal Board opinion at the Board's earliest convenience.

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:
Enclosure: *Parent v. Rincon Valley Union Elementary School District* (OAH 2018) Case No. 2018050651

CC: Loretta Melby, Executive Officer BRN (Loretta.Melby@dca.ca.gov)

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

CALIFORNIA SCHOOL NURSES ORGANIZATION

Optimizing Student Health and Enhancing Learning

October 25, 2021

Sent via email to addressees

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RE: Re: Email request – Thursday, October 21, 2021
BVNPT review of Agenda Item 7 – BVNPT Education & Practice Committee Meeting – Wednesday, October 27, 2021

Dear Mr. Swenson and Ms. Yamaguchi:

In response to your email request for information on LVNs in the school setting and the supervision by School Nurses, we are only referring to the information in the specific case referenced in the letter from Atkinson, Andelson, Loya, Rudd and Romo.

The California School Nurses Organization (CSNO) is the professional school nurse organization and as the primary health professional in the K-12 system provides programs and services that enhance learning and optimize student health.

As noted, we did submit a letter to the California Board of Registered Nursing (BRN) providing information on the issues relating to school nurses in the K-12 and charter school settings. The Nurse Practice Act provides the legal framework – "mandates the Board to set the scope of practice and responsibilities for RNs – Business & Professions Code, Section 2700.

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However, the role and functions of the credentialed school nurse are expanded and found in the California Education Code:

Title 2 Elementary and Secondary Education – Section 49426

A school nurse is a registered nurse currently licensed under Chapter 6 (commencing with Section 2700) of Division 2 of the Business and Professions Code, and who has completed the additional educational requirements for, and possesses a current credential in, school nursing pursuant to Section 44877.

Education Code - Section 44877:

The qualifications for a nurse shall be a valid certificate of registration issued by the Board of Nurse Examiners of the State of California or the California Board of Nursing Education and Nurse Registration and a health and development credential, a standard designated services credential with a specialization in health, or a services credential with a specialization in health. Additionally, in order to be a "School Nurse", one must meet the requirements as required by the Commission on Teacher Credentialing:

School Nurse Services Credential (CL-380) (ca.gov)

Legally, LVNs cannot be called nor practice as "school nurses" in California.

K-12 & IEPs

All health care provided in the K-12 setting is based on orders from the child's physician, which establishes medical necessity. In this case, the care provided the child was ordered by the physician and outlined in an Individual Education Plan – IEP which is a federal requirement outlined in IDEA – Individuals with Disabilities Education Act:

The Individuals with Disabilities Education Act (IDEA) is a law that makes available a free appropriate public education to eligible children with disabilities throughout the nation and ensures special education and related services to those children.

A review of Education Code – Title 2, Sections 49400 – 49417 dictate how medical cannabis is handled in the educational setting:

see specific Section 49414.1 - (g) This section does not require the staff of a school district, county office of education or charter school to administer medicinal cannabis. *(Amended by Stats. 2020, Ch. 370, Sec. 80. (SB 1371) Effective January 1, 2021.)*

Additionally, when medication is ordered in the educational setting, Title 2, Section 49423 outlines the criteria required from the student's physician or surgeon by which the medication is to be taken.

However, an IEP dictates the course of treatment for this specific student.

In circumstances not governed by an IEP, we submit the following for your review:

the FDA statement regarding the authorization of Epidiolex:
FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy | FDA

School nurses, if administering medical cannabis, are only doing so if it is Epidiolex and any other FDA approved medications. At this time, the other approved cannabis related products, Marinol, Syndros, and Cesamet, have not been prescribed for school-age children to the best of our knowledge.

Our position on medical cannabis for the treatment of epilepsy follows the FDA authorization and guidance from the National Association of School Nurses
Position Brief - Cannabis/Marijuana - National Association of School Nurses (nasn.org)

We also provide for your review:

Medical Cannabis and School: Separating Fact From Fiction - MaryAnn Tapper Strawhacker, 2020 (sagepub.com)

Medical Marijuana Guidelines for Practice: Health Policy Implications (ncsbn.org)

Title 2, Section 49423.5 describes the employment of medical personnel to assist individuals with exceptional needs that require specialized physical health care services in the educational setting. Section 3051.12 of Title 5 of the California Code of Regulations establishes the supervisorial requirements to deliver such services in the educational setting. The California Education Code 49423.5 upholds the federal requirements and was reaffirmed by the California State Supreme Court in May of 2013.

According to the CCR's:

Qualified designated school personnel trained in the administration of specialized physical health care if they perform those services under the supervision, as defined by Section 3051.12 of Title 5 of the California Code of Regulations, of a credentialed school nurse, public health nurse, or licensed physician and surgeon and the services are determined by the credentialed school nurse or licensed physician and surgeon, in consultation with the physician treating the pupil, to be all of the following:

(A) Routine for the pupil.
(B) Pose little potential harm for the pupil.
(C) Performed with predictable outcomes, as defined in the individualized education program of the pupil.
(D) Do not require a nursing assessment, interpretation, or decision making by the designated school personnel.
(b) Specialized health care or other services that require medically related training shall be provided pursuant to the procedures prescribed by Section 49423.

Education Code 49422 establishes the Credentialed School Nurse as the supervisor of health and development in the educational setting. Staff performing medically necessary services are supervised by the credentialed school nurse, public health nurse or physician.

In the California Board of Registered Nursing's *Understanding the Role of the Registered Nurse and Interim Permittee*, according to the Nursing Practice Act, the California Code of Regulations, and Selected Sections of Title XXII, "LVN is not prepared by formal education to make RN level nursing judgments that include independent analysis, synthesis, and decision-making." Further, in Supervision of the LVN, "the RN provides direction and clear expectations of how a task is to be performed and monitors performance to assure compliance with established practice standards, policies, and procedures."

Pursuant to California Education Code 49423 (b) (1) outlines the required elements needed for medication administration in the educational setting.

(b) (1) In order for a pupil to be assisted by a school nurse or other designated school personnel pursuant to subdivision (a), the school district shall obtain both a written statement from the physician and surgeon or physician assistant detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken and a written statement from the parent, foster parent, or guardian of the pupil indicating the desire that the school district assist the pupil in the matters set forth in the statement of the physician and surgeon or physician assistant.

Once a physician's order and parental consent are received, it is the responsibility of the school site administrator to identify individuals who will assist the student with medication administration. The school nurse trains and supervises individuals in the administration of such medication. The California School Nurses Organization has established Standards of Practice for Medication Administration as well as documentation and supervision of medication administration and an individual's capacity to perform the procedure in the educational setting.

We appreciate that you have reached out to the California School Nurses Organization. Please let us know if you have additional questions.

Sincerely,

Sheri Coburn, EdD, MS, RN, PHN, RCSN,
Executive Director Consultant
California School Nurses Organization

Lydia C. Bourne

Lydia Bourne, MA, BSN, RN, PHN
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