California Bar Examination

Performance Tests and Selected Answers

February 2017

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

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PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2017

CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2017 California Bar Examination and two selected answers for each test.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

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Performance Test A

INSTRUCTIONS AND FILE

IN RE COLUMBIA NURSES ASSOCIATION

IN RE COLUMBIA NURSES ASSOCIATION

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no parameters on how to apportion your time, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

STATE OF COLUMBIA
DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

MEMORANDUM

TO: Applicant

FROM: James Wood, General Counsel

DATE: February 21, 2017

RE: Columbia Nurses Association Demand Letter

On February 10, 2017, the Columbia Department of Education (Department) issued a Legal Advisory to all superintendents of school districts advising them: (1) the Columbia School Medication Act authorizes school personnel who are not school nurses—unlicensed school personnel—to administer insulin to students with diabetes, including by injection; and (2) the Columbia Nursing Practice Act does not prohibit them from doing so.

Unsurprisingly, on February 16, 2017, the Columbia Nurses Association (CNA) sent the Department a letter demanding that it withdraw the Legal Advisory. The CNA argues that the Nursing Practice Act prohibits unlicensed school personnel from administering insulin to students with diabetes and that the School Medication Act does not authorize them to do so.

Please draft, for my signature, a letter to the CNA responding to its demand letter, stating that the Department declines to withdraw the Legal Advisory and arguing that the Department's position is sound and that the CNA's is not.

STATE OF COLUMBIA
DEPARTMENT OF EDUCATION
LEGAL ADVISORY

TO: All Superintendents of School Districts

FROM: Lila Lanford, Secretary of the Department of Education

DATE: February 10, 2017

RE: Administration of Insulin to Students With Diabetes

Some school districts have recently raised the question whether school personnel other than school nurses—unlicensed school personnel—may administer insulin to students with diabetes, including by injection. Citing the Columbia Nursing Practice Act, they have proceeded to give a negative answer.

Broadly speaking, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sections 1400, et seq., was enacted by Congress as anti-discrimination statutes to grant students with disabilities a right to a free appropriate public education, with a complementary right to health care services, at no cost to themselves or their families, in order to enable them to take full advantage of educational opportunities equally with their peers. The health care services to which students with disabilities have a right include the administration of needed medication. Students with diabetes are students with a disability within the meaning of the IDEA, and need medication including insulin.

It is undisputed that, under the School Medication Act and the Nursing Practice Act, school nurses may administer insulin to students with diabetes. After review, we have concluded that, under the School Medication Act, unlicensed school personnel may do so as well, without offense to the Nursing Practice Act.

Properly construed, the School Medication Act authorizes unlicensed school personnel to administer insulin to students with diabetes, and the Nursing Practice Act does not

prohibit them from doing so. Any other construction of the School Medication Act and the Nursing Practice Act would yield unreasonable results and run the risk of making the statutes an obstacle to Congressional objectives as they appear in the IDEA.

If you have any questions about this Legal Advisory, please contact General Counsel James Wood at the Columbia Department of Education, 300 King Street, Springfield, Columbia or jwood@cde.columbia.gov.

COLUMBIA NURSES ASSOCIATION

2000 FRANKLIN STREET

MAPLETON, COLUMBIA

February 16, 2017

James Wood, Esq.
General Counsel
Columbia Department of Education
300 King Street
Springfield, Columbia

Re: Legal Advisory

Dear Mr. Wood:

On February 10, 2017, as you are aware, the Columbia Department of Education (Department) issued a Legal Advisory on the "Administration of Insulin to Students With Diabetes." In the Legal Advisory, the Department concluded that school personnel other than school nurses—unlicensed school personnel—are authorized to administer insulin to students with diabetes, including by injection, by the School Medication Act, and are not prohibited from doing so by the Nursing Practice Act.

On behalf of the Columbia Nurses Association (CNA), whose 310,000 members include the state's 2,800 school nurses, I am writing to demand that the Department withdraw the Legal Advisory immediately.

First, contrary to the conclusion advanced by the Department in the Legal Advisory, the School Medication Act does *not* authorize unlicensed school personnel to administer insulin to students with diabetes. The School Medication Act authorizes unlicensed school personnel only to *assist* students with medication, that is, only to *help* students

administer medication *to themselves*, not to *administer* medication to students. School Medication Act, Section 3(a). That means that the School Medication Act authorizes unlicensed school personnel only to help students with diabetes administer insulin to themselves, not to administer insulin to students. If there were any ambiguity on this point, the legislative history of the School Medication Act would dispel it. In 2002, the Legislature amended the School Medication Act to authorize unlicensed school personnel to administer insulin to students with diabetes, but the Governor vetoed the amendment.

Second, contrary to the conclusion advanced by the Department in the Legal Advisory, the Nursing Practice Act prohibits unlicensed school personnel from administering insulin to students with diabetes. The Nursing Practice Act provides that, unless he or she possesses a license, no person may engage in the practice of nursing, which includes the administration of medication, such as insulin. Nursing Practice Act, Sections 2 and 3(a)(2). Although the Nursing Practice Act contains exceptions, *id.* Section 4, none allows unlicensed school personnel to administer insulin to students with diabetes. The exception that arguably comes closest is not close enough. The Nursing Practice Act provides that it "does not prohibit" the "performance by any person of such duties as required in the physical care of a patient in accordance with orders issued by a physician," as long as such a person does not engage in the practice of nursing. *Id.* Section 4(e). In administering insulin to a student with diabetes, unlicensed school personnel would necessarily be engaging in the practice of nursing, since the practice of nursing includes the administration of medication, even if unlicensed school personnel were acting "in accordance with orders issued by a physician."

Third, the CNA recognizes that, under the Individuals with Disabilities Education Act (IDEA), students with diabetes have a disability and need medication including insulin. That said, the IDEA does not displace state statutes. *See,* U.S. Dept. of Health and Human Services, *Helping the Student With Diabetes Succeed: A Guide for School Personnel* (Sept. 1, 2016). Neither does the IDEA grant students with disabilities any right to medication except as needed. *See, Davis v. Francis Howell School District*

(U.S. Dist. Ct., N.D. Columbia, 2015). Of course, no student with diabetes needs insulin administered by unlicensed school personnel. It goes without saying that the administration of insulin is hardly a trivial matter. Insulin has been identified as a "high-alert" medication by the United States Department of Health and Human Services. U.S. Dept. of Health and Human Services, *High-Alert Medications* (Jan. 1, 2017). As a high-alert medication, insulin is presumptively too dangerous for unlicensed school personnel to administer.

If the Department fails to withdraw the Legal Advisory immediately, the CNA will initiate an action to declare the Legal Advisory invalid as contrary to law. The CNA is confident that it would prevail in such an action.

The CNA urges the Department not to waste its limited resources in litigation, but to use such resources wisely for the benefit of all students, including students with diabetes, to help school districts hire more school nurses. The CNA accordingly urges the Department to do what is both proper and prudent—withdraw the Legal Advisory straightaway.

Very truly yours,

Marilyn Cones

Marilyn Cones
Associate General Counsel

Helping the Student With Diabetes Succeed: A Guide for School Personnel

United States Department of Health and Human Services
September 1, 2016

Diabetes is one of the most common chronic diseases in school-aged children, affecting about 200,000 young people in the United States. According to recent estimates, about 19,000 youths are diagnosed with diabetes each year.

Diabetes is a serious chronic disease in which blood glucose (sugar) levels are above normal due to defects in insulin production, insulin action, or both. Diabetes is the sixth leading cause of death by disease in the United States. Long-term complications of diabetes include heart disease, stroke, blindness, kidney failure, nerve disease, gum disease, and amputation of the foot or leg. Although there is no cure, diabetes can be managed and complications can be delayed or prevented.

Diabetes must be managed 24 hours a day, 7 days a week. For many students with diabetes, that means careful monitoring of their blood glucose levels throughout the school day. It also means administering multiple doses of insulin by injection to control their blood glucose and minimize complications in order to enable them to survive. Insulin must be administered at unpredictable as well as predictable times in the course of the school day, at unpredictable as well as predictable places on and off campus, including in the classroom and on field trips and during extracurricular activities. Some students with diabetes can monitor their own blood glucose levels and administer insulin to themselves. Monitoring blood glucose levels and administering insulin are tasks well within the competence of practically all adults and many young people as well. But although some students with diabetes can monitor their own blood glucose levels and administer insulin to themselves, many others cannot. As a result, coordination and collaboration among members of the school health team—including the school nurse, if any, other school

personnel, and the student himself or herself—and the student's personal diabetes health care team—including the student's physician, the student's parents or guardians, and again the student himself or herself—are essential for helping students manage their diabetes in the school setting.

The purpose of this guide is to educate school personnel about effective diabetes management and to share a set of practices that enable schools to ensure a safe learning environment for students with diabetes, particularly those who use insulin to control the disease. The school health team and the training approach for school-based diabetes management explained in this guide build on what schools already are doing to support children with chronic diseases. The practices shared in this guide are consistent with the requirements of the Individuals with Disabilities Education Act (IDEA), which is enforced by the U.S. Department of Education for each student with diabetes. This guide can be used, however, in determining how to address the needs of students with diabetes. The individual situation of any particular student with diabetes will affect what is legally required for that student. In addition, this guide does not address State and local laws, because the requirements of these laws may vary from state to state and school district to school district. This guide should be used in conjunction with Federal as well as State and local laws.

* * * * *

High-Alert Medications

United States Department of Health and Human Services

January 1, 2017

High-alert medications are substances that carry a heightened risk of causing significant patient harm when they are used in error. Although errors may or may not be more common with these substances, the consequences of an error are clearly more devastating. We hope you will use this list to determine which of these substances require special safeguards to reduce the risk of errors. This may include strategies like improving access to information about these substances; limiting access; using auxiliary labels and automated alerts; standardizing ordering, storage, preparation, and administration; and employing redundancies such as automated or independent double-checks when necessary.

Colchicine injection

Epoprostenol

Insulin

Magnesium sulfate

Methotrexate

Opium tincture

Oxytocin

Nitroprusside sodium

Potassium chloride

Potassium phosphate

Promethazine

Sodium chloride

Sterile water for injection, inhalation, and irrigation

The Nursing Shortage in Columbia:
Policy Advisory

State of Columbia
Board of Nursing
January 15, 2017

With only 310,000 nurses to serve a population of 35 million people, Columbia is experiencing a severe nursing shortage—a shortage that is likely to become even more severe in the foreseeable future.

Just last year, the Columbia Legislature found that the state "faces an ever-increasing nursing shortage that jeopardizes the health and well-being of the state's citizens." A forecast for 2030 predicts that Columbia will need 100,000 to 120,000 more nurses than the state will have available to meet health care needs. That statewide challenge will call for different responses depending on the region. Urban areas will need nurses to care for a growing, aging population. Rural areas are likely to lose nurses as their nurse population retires and are unlikely to replace them because of the absence of nursing education programs there. All areas will need nurses for safe, competent care in a host of settings.

By way of example, Columbia faces an ever-increasing school nursing shortage. There are more than 6 million students in Columbia public schools. Among them, 600,000 have some sort of disability, including 14,000 with diabetes, 12,000 with hearing impairment, 12,000 with orthopedic impairment, and 6,000 with visual impairment. There are only 2,800 school nurses to care for all of these 6+ million students, constituting only 1 school nurse for every 2,200 students; only 5 percent of schools have a school nurse full-time; 69 percent have a school nurse part-time; and 26 percent have no school nurse at all.

Factors contributing to Columbia's nursing shortage include changes in the healthcare environment that resulted in downsizing of the nursing work force as a result of managed care, the aging nursing work force, and public policy regarding nursing education. As a result, Columbia ranks 50th in the nation in number of nurses per 100,000 population. The current shortage is termed a "public health crisis" owing to a projected shortfall of 25,000 nurses within the next five years. Finding 25,000 additional nurses over the next five years only maintains the status quo.

Columbia cannot easily obtain additional nurses by increasing out-of-state recruitment. Half of the nurses working in Columbia already are educated in other states or countries. The shortage is occurring in other states and the educational pipeline, especially at the baccalaureate level, is decreasing nationally. Recruitment efforts aimed at increasing enrollments in Columbia programs are problematic. Until recently, all pre-licensure nursing education programs were fully subscribed, many with waiting lists of up to four years. Additionally, the number of pre-licensure nursing education enrollment opportunities have decreased slightly over the last 10 years rather than increasing to keep pace with increases in population.

While nursing shortages are not new, the current situation differs from past shortages. Not only is the shortage in number of nurses, the educational preparation of nurses is inadequate to meet the demands of today's health care system. Employers demand more nurses for hospitals and specialty nurses for intensive care units, operating rooms, emergency rooms, and other specialized areas of acute care.

In an effort to address the nursing shortage, the Board of Nursing has divided its work into three phases. The first phase will focus on development of a dynamic work force forecasting model to measure the need for nurses. The second phase will focus on a master plan for nursing education and practice. The third phase will focus on evaluating the utility of the competencies for education and practice, synthesizing the next set of data, and creating an ongoing mechanism to continue collecting and analyzing data regarding the nursing work force. The Board of Nursing will publish an interim report on

the completion of each phase, aiming for publication of the first-phase interim report in October 2017, the second-phase interim report in February 2018, and the third-phase interim report in May 2018. The Board of Nursing will publish a final report containing a comprehensive action plan in or around September 2018.

February 2017

California Bar Examination

Performance Test A

LIBRARY

IN RE COLUMBIA NURSES ASSOCIATION

LIBRARY

Selected Entries from the

21st Century American Dictionary

Third Edition, 2016

Administer

ad·min·is·ter verb \əd-'mi-nə-stər\

transitive verb

1: to manage or supervise the execution, use, or conduct of <*administer* a trust fund>

2a : to mete out : dispense <*administer* punishment> b : to give ritually <*administer* the last rites> c : to give remedially by placing into or onto the body<*administer* a dose of medicine>

intransitive verb

1: to perform the office of administrator

2: to furnish a benefit : minister <*administer* to an ailing friend>

3: to manage affairs

* * * * *

Assist

as·sist verb \ə-'sist\

transitive verb

: to give support or aid to another by doing something for the other <*assisted* the boy with his dressing by putting on his rain boots> or by helping the other do something him- or herself <*assisted* the girl with her lessons by answering her questions>

intransitive verb

1: to give support or aid <*assisted* at the stove> <another surgeon *assisted* on the operation>

2: to be present as a spectator <the ideal figures *assisting* at Italian holy scenes — Mary McCarthy>

* * * * *

Selected Provisions of the

Columbia School Medication Act

Section 1.

(a) This statute may be referred to as the School Medication Act.

(b) This statute shall be construed broadly in order to give effect to the intent of the Legislature, which is to promote the health and safety of students in the public schools of this state.

(c) The Legislature finds that there is a severe shortage of school nurses in this state and declares that it enacts this statute to address that shortage.

Section 2.

No person shall administer medication to any student in any public school in this state.

Section 3.

(a) Notwithstanding Section 2 of this statute, any student who is required to take medication prescribed for him or her by a physician may be assisted by a school nurse or by other school personnel, whether or not such personnel are licensed as health care professionals, if the school district receives the appropriate written statements identified in subsection (b).

(b) In order for a student to be assisted pursuant to subsection (a), the school district shall obtain (i) written orders issued by the student's physician for the administration of the medication, detailing the name of the medication, method, amount, and conditions for its administration and (ii) written consent by the student's parent or guardian indicating a desire that the school district provide assistance to the student in the matters set forth in the written orders of the physician.

Section 4.

(a) Notwithstanding Section 2 of this statute, any student with diabetes who is required to take insulin prescribed for him or her by a physician may administer insulin to himself or herself if the school district receives the appropriate written statements identified in subsection (b).

(b) In order for a student with diabetes to administer to himself or herself pursuant to subsection (a), the school district shall obtain (i) written orders issued by the student's physician for the self-administration of insulin, detailing the name of the insulin, method, amount, and conditions for its self-administration and (ii) written consent by the student's parent or guardian indicating a desire that the school district allow the student to administer insulin to himself or herself in the matters set forth in the written orders of the physician.

* * * * *

Historical and Statutory Notes.

* * * * *

Section 3. In 2002, the Legislature passed Assembly Bill No. 481 (2002 Reg. Sess.), which would have amended Section 3 to provide that, in the absence of a school nurse, other school personnel without any license as a health care professional "shall administer assistance to students with diabetes," including "administering insulin" to them. Assem. Bill No. 481 (2002 Reg. Sess.), as enrolled Sept. 17, 2002, Section 2. The Governor vetoed Assembly Bill No. 481. In the veto message, the Governor stated that "Section 3 'already provides that any student who is required to take … medication … may be assisted by unlicensed school personnel,' and hence already authorizes such personnel to administer insulin to students with diabetes." Governor's Veto Message to Assem. on Assem. Bill No. 481 (2002 Reg. Sess.) (Sept. 26, 2002).

Selected Provisions of the

Columbia Nursing Practice Act

Section 1.

This statute may be referred to as the Nursing Practice Act.

Section 2.

No person may engage in the practice of nursing in this state without a valid and current license issued by the Board of Nursing.

Section 3.

(a) The practice of nursing within the meaning of this statute consists of 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. Such functions may include any and all of the following:

(1) Direct 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.

(2) Direct and indirect patient care services, including, but not limited to, the administration of medication, necessary to implement a treatment, disease prevention, or rehabilitative regimen ordered by a physician, dentist, podiatrist, or clinical psychologist.

(3) The performance of skin tests, immunization techniques, and the withdrawal of human blood from veins and arteries.

(4) Observation of signs and symptoms of illness, reactions to treatment, general behavior, or general physical condition, and (i) determination of whether the

signs, symptoms, reactions, behavior, or general appearance exhibit abnormal characteristics, and (ii) implementation, based on observed abnormalities, of appropriate reporting or referral or the initiation of emergency procedures.

Section 4.

This statute does not prohibit:

(a) Gratuitous nursing of the sick by friends or members of the family.

(b) Incidental care of the sick by domestic servants or by persons primarily employed as housekeepers.

(c) Domestic administration of family remedies by any person.

(d) Nursing services in case of an emergency. "Emergency," as used in this subsection, means an epidemic or public disaster.

(e) The performance by any person of such duties as required in the physical care of a patient in accordance with orders issued by a physician, as long as such a person does not hold him- or herself out as a nurse.

* * * * *

Section 35.

This statute shall be construed broadly in order to give effect to the intent of the Legislature, which is to promote the health and safety of the people of this state.

Davis v. Francis Howell School District

United States District Court for the Northern District of Columbia (2015)

Mary and Bobby Davis sued the Francis Howell School District, claiming that its refusal to administer to their son Shane his prescribed dose of Ritalin to treat attention deficit hyperactivity disorder (ADHD) violates the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sections 1400, et seq.

The school district has moved for summary judgment.

The law is settled. Congress enacted the IDEA as an anti-discrimination statute to grant students with disabilities a right to a free appropriate public education, with a complementary right to health care services, at no cost to themselves or their families, in order to enable them to take full advantage of educational opportunities equally with their peers. Congress stated the IDEA's purpose as to include "ensur[ing]" that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related" health care and other "services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. Section 1400(d)(1)(A). The health care services to which students with disabilities have a right include the administration of needed medication. 34 C.F.R. Section 300.34(c)(13). Any prohibition in state law that stands as an obstacle to the accomplishment of Congressional objectives is preempted under the Supremacy Clause of the United States Constitution. *Hines v. Davidowitz* (U.S. Supreme Ct. 1941).

The evidence is undisputed. Suffering as he does from ADHD, Shane is a student with a disability. His physician has prescribed a daily dosage of 360 milligrams of Ritalin to control his symptoms of ADHD, up to 120 milligrams of which must be administered during the school day in one or two doses. The school nurse at Shane's school had been administering his school-time dose of Ritalin for over a year when she expressed concern to Mrs. Davis that the dose might be dangerous because it far exceeded the

recommended maximum dosage of 60 milligrams stated in the Physician's Desk Reference, which is the leading authoritative source of drug information approved by the Food and Drug Administration. Under the Columbia Medication Review Act, a "school nurse has the right and obligation to refuse to give any medication in excess of the recommended maximum dosage as stated in the Physician's Desk Reference." Medication Review Act Section 3. In accordance with the statute, the school nurse at Shane's school refused to continue to administer his school-time dose of Ritalin. The school district offered to allow the Davises to come to school to administer the medication themselves, but they refused the offer.

In moving for summary judgment, the school district argues that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law because Shane was not denied any right under the IDEA.

For the school district's summary judgment motion, the threshold issue—which turns out to be dispositive—involves the proper construction of the IDEA and the Medication Review Act.

In construing a statute, a court undertakes a single fundamental task, which is to effectuate the intent of the legislative body. *Smith v. District Court* (15th Cir. 2006). It begins with the language of the statute. *Cummins, Inc. v. District Court* (15th Cir. 2005). In doing so, it takes the statute's words as it finds them, giving them their usual and ordinary meaning. *Id.* Not only does it begin with the words of the statute, it also ends with them if they are unambiguous. *Id.* But if the words of the statute are ambiguous, it proceeds to extrinsic materials including legislative history and background facts. *Smith*, *supra*. In resolving any ambiguity that might remain in the words of the statute, it adopts a reading of the statute that yields reasonable results and rejects a reading that yields unreasonable ones. *Id*. Among other things, it avoids reading the statute in such a way as to set up an obstacle to the accomplishment of Congressional objectives and would thereby avoid preemption. *Santa Clara County Local Transportation Authority v. Guardino* (15th Cir. 1995).

Although Congress intended to grant students with disabilities a right to receive the administration of needed medication by means of the IDEA, there is absolutely *no* language in the IDEA that could conceivably be read to grant *any* student with *any* disability a right to receive even needed medication *in a potentially dangerous dosage*. As noted, the IDEA's purpose includes "ensur[ing]" that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related" health care and other "services," such as administration of needed medication, "designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. Section 1400(d)(1)(A). Not a word of the IDEA's language supports the existence of any right to receive medication in a potentially dangerous dosage. Quite the contrary. The IDEA's language precludes the existence of any such right because the IDEA aims to further the welfare of children with disabilities, not to undermine it.

And even if the language of the IDEA were ambiguous on this score—and it is not—there is *no* extrinsic material supporting a reading that the IDEA granted *any* student with *any* disability a right to receive even needed medication *in a potentially dangerous dosage*. That is hardly surprising, since, as indicated, the IDEA aims to further, not undermine, the welfare of children with disabilities.

In attempting to avoid summary judgment, the Davises ignore the IDEA itself. Instead, they argue that the language of the Medication Review Act is ambiguous in stating that a "school nurse has the right and obligation to refuse to give any medication in excess of the recommended maximum dosage as stated in the Physician's Desk Reference" (Medication Review Act Section 3) and that, if it were read in accordance with the apparent meaning of its words, it would set up an obstacle to the accomplishment of Congressional objectives in the IDEA and would thereby suffer preemption. We disagree. There is nothing ambiguous about the language of the Medication Review Act. Nor does the Medication Review Act's language constitute an obstacle to any Congressional objectives in the IDEA. As stated, the IDEA does not grant *any* student

with *any* disability a right to receive even needed medication *in a potentially dangerous dosage.* Practically by definition, a dosage of any medication that is in excess of the recommended maximum dosage as stated in the Physician's Desk Reference is a potentially dangerous dosage.

Because, under the law and the evidence, Shane was not denied any right under the IDEA, there is no genuine dispute as to any material fact and the school district is entitled to judgment as a matter of law. We accordingly grant the school district's motion for summary judgment and enter judgment in its favor.

PT-A: SELECTED ANSWER 1

To: Columbia Nurses Association C/O Marilyn Cones, Associate General Counsel
From: James Wood, General Counsel
Date: February 21, 2017
Re: Demand Letter to Withdraw Legal Advisory dated 2/10/17

Dear Ms. Cones:

This letter is in response to your letter of February 16, 2017 requesting that the State of Columbia Department of Education withdraw its recent Legal Advisory dated February 10, 2017. Please be advised that the State of Columbia Department of Education will not withdraw its legal advisory because it is sound, both legally and with respect to public policy. We have considered your well-intentioned positions as outlined in your letter and will respond to each more thoroughly below. We appreciate your view that a Columbia Court will side with your reading of the SMA and NPA, but based on the rules of statutory construction, we respectfully decline to agree with your assertions. Moreover, although we recognize that there is a nursing shortage in Columbia, we do not believe the situation can be fixed simply by hiring more school nurses.

Rules of Statutory Construction

In determining how to construe a state statute, a court's main function is to effectuate the intent of the legislature. (Smith v. District Court.) The starting, and end point if the words are unambiguous, is the language within the statute itself - giving words their usual and ordinary meaning. (Cummins v. District Court.) If the words are ambiguous a court will look at extrinsic factors including the statute's legislative history and background facts and adopt a reading of the statute that yields reasonable results (Smith v. District Court.) Moreover, a court will not read a statute in such a way that it would impede the accomplishment of a Congressional objective. (Santa Clara v.

Guardino.) With that baseline of understanding, we will proceed to address your positions below.

The SMA authorizes unlicensed school personnel to administer insulin to students with diabetes

It is your position that the SMA does not authorize unlicensed school personnel to administer insulin to student with diabetes. You claim that the SMA authorizes unlicensed school personnel only to *assist* students with medication. In other words, the language of SMA Section 3(a) only allows unlicensed professionals to help students administer medication to themselves, not to *administer* medication to students. Your reading of this language is incorrect and even if it were correct, it would also prevent licensed nurses from administering insulin to students with diabetes.

The language of the SMA is unambiguous:

As mentioned above, the first step in statutory construction is looking at the language of the statute. If the language is unambiguous a Court will not look past the ordinary and plain meaning of the words of the statute (Smith v. District Court). The language of Section 3(a) reads: "Notwithstanding Section 2 of this statute, any student who is required to take medication prescribed for him or her by a physician may be assisted by a school nurse or by other school personnel, whether or not such personnel are licensed as health care professionals" (emphasis added). You take a constrictively narrow reading of the word "assist" to mean that it can only be read to mean "help," and strictly cannot be read to mean "provide," or "to do for." However, the very first definition of "assist" in the 21st Century American Dictionary provides that "assist" shall mean "to give support or aid to another *by doing something for the other"* (emphasis added). Therefore, you overlook one of the most basic understandings of the word "assist" because it runs counter to your position, which is untenable. Moreover, if your definition of "assist" were to apply, school nurses would be prohibited from administering insulin as well because the language of the statute applies equally to

school nurses and unlicensed school professionals. Because the ordinary and plain meaning of the word "assist" includes "to give support or aid to another by doing something for the other," the language of the statute is unambiguous and requires no further analysis. However, even if it were ambiguous, the legislative history and purpose support the Department of Education's position.

Legislative history of the SMA also supports our position:

You contend that the legislative history of the SMA clears up any ambiguity on this point in your favor. In fact, it is just the opposite. You claim that because the governor vetoed the amendment it is dispositive of the fact that the government did not intend for unlicensed professionals to administer insulin to students with diabetes. If you read the Historical and Statutory Notes of that veto, you will very clearly see that the Governor vetoed the amendment because Section 3 *already allowed* unlicensed school personnel to administer insulin to students with diabetes, and the amendment was superfluous. In the Notes, the Governor expressly states: "Section 3 'already provides that any student who is required to take ... medication ... may be assisted by unlicensed school personnel,' and hence already authorizes such personnel to administer insulin to students with diabetes." (Governor's Veto Message to Assem. on Assem. Bill No. 481.) Therefore, both the express language of the SMA and its legislative history support our position.

Our reading of the word "assist" furthers the intent of the Legislature

Your position also clearly runs counter to the purpose of the statute, which is to "promote the health and safety of students in the public schools of this state." (Section 1(b).) Indeed, the language of the statute provides that it should be construed broadly in order to give effect to the intent of the Legislature (Section 1(b)). However, your restrictive reading of the word "assist" does not give effect to that intent. Section 4 provides that any student with diabetes who is required to take insulin may administer insulin to himself or herself if the school district receives written physician orders and written consent by the parents. It simply could not have been the intent of the

legislators that young children could be permitted to administer insulin to themselves, but that the help of a competent, capable adult would not be permitted. Therefore, we believe that the only way the SMA can be read and interpreted is to authorize unlicensed school personnel to administer insulin to students with diabetes.

The NPA does not prohibit unlicensed school personnel from administering insulin to students with diabetes

It is also your position that the NPA prohibits unlicensed school personnel from administering insulin to students with diabetes. You cite NPA Sections 2 and 3(a)(2) to support your contention that unless a school personnel possesses a license, he or she may not engage in the practice of nursing, which includes the administration of medication such as insulin. You also recognize that there are exceptions in the statute, but that none of them are on point here to allow unlicensed school personnel to administer insulin to students with diabetes. You reading of the plain language in this statute is also misguided and there is nothing in the NPA that prohibits unlicensed school personnel from administering insulin, and in fact, both the NPA and SMA can be read together harmoniously.

Language of the statute:

We agree with you that the language of the NPA is clear - no person may engage in the practice of nursing in this state without a valid and current license issued by the Board of Nursing (Section 2). That being said, Section 3(a) goes on to provide: "The practice of nursing ... consists of 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" (emphasis added). This means that for an act to fall within the practice of nursing it must have a health care function AND requires a substantial amount of scientific knowledge or technical skill. We do not believe that administering insulin requires a substantial amount of scientific knowledge

or technical skill. Moreover, if we were to accept your position that it does constitute "the practice of nursing" then any student who self-administers insulin injections would be violating this statute.

Additionally, it is our reading of Section 4(e), which you don't think provides an exclusion from this statute, that it expressly excludes an unlicensed school personnel who is administering insulin pursuant to a doctor's order. Section 4(e) expressly provides: "This statute does not prohibit ... the performance by any person of such duties as required in the physical care of a patient in accordance with orders issued by a physician, as long as such person does not hold him- or herself out as a nurse." Under the SMA, before an unlicensed school personnel can administer insulin to a diabetic student, the school district must first obtain 1) written orders issued by the student's physician detailing the procedure for the administration of the medicine, and 2) written consent by the student's parents or guardian allowing the school district to allow an unlicensed school personnel to administer the insulin. (SMA Section 3(b).) The school personnel who administer the insulin to the students are not holding themselves out to be nurses. Instead, they are merely performing a duty as specifically required and detailed in accordance with orders issued by a physician.

<u>Legislative Purpose to promote health and safety of people in Columbia.</u>

NPA Section 35 provides that the statute should be construed broadly in order to give effect to the intent of the Legislature, which is to promote the health and safety of the people in this state. Therefore, the language of this statute should be read in a way not to limit aid to children suffering from diabetes, but rather to increase aid and allow other channels of support and assistance. Only allowing nurses to administer insulin would limit the number of people who can help and assist children with diabetes, and be contrary to the intent of the legislature.

Your reading of the SMA and NPA would yield unreasonable results and risk making the statutes an obstacle to Congressional objectives in IDEA.

You claim that the IDEA does not displace state statutes. We agree; however, we do not agree with the rest of your assertions. When state statutes impede the accomplishments of Congressional objectives they are preempted under the Supremacy Clause. (See Hines - "Any prohibition in state law that stands as an obstacle to the accomplishment of Congressional objectives is preempted under the Supremacy Clause of the US Constitution.") Moreover, a court will not read a statute in such a way that it would impede the accomplishment of a Congressional objective. (Santa Clara v. Guardino).

Congress enacted IDEA as an anti-discrimination statute to grant students with disabilities a right to a free appropriate public education, with a complementary right to health care services, at no cost to themselves or their families. (20 USC Section 1400(d)(1)(A).) This allows them to take full advantage of educational opportunities equally with their peers because their medical needs will be met in public schools. Included in the health care services to which students with disabilities have a right are needed medications, including insulin. As discussed above, your narrow interpretation of both the SMA and NPA would yield unreasonable results because it would restrict access to needed medication in schools for disabled students, which would have the effect of inhibiting their education and creating an obstacle to the Congressional objectives of IDEA.

You cite Davis v. Francis Howell School District for the proposition that the IDEA does not grant students with disabilities any right to medication except as needed and that "no student needs insulin administered by an unlicensed school personnel." That however, is simply not true - when students with diabetes need insulin, they need it right away. The US Department of Health and Human Services has stated that diabetes must be managed 24 hours a day, 7 days a week. Moreover, diabetes requires careful monitoring throughout the school day, administering multiple doses of insulin by injection at predictable and unpredictable times at predictable as well as unpredictable locations, to control blood glucose and to minimize complication in order for the diabetic student to **survive**. Although some students can monitor their own blood glucose

levels, many cannot and, as a result, the US DHHS has stated that coordination between school nurses, other school personnel, the student's physician, and student's parents is essential.

Moreover, you claim that because insulin is a high-alert medication, insulin is "presumptively too dangerous for unlicensed school personnel to administer." We believe that because of the nature of diabetes, the failure to administer insulin when it is required is presumptively too dangerous. Additionally, the holding of Davis is much narrower than the proposition for which you cite it. Davis holds that IDEA does not grant *any* student with *any* disability a right to receive even needed medication *in a potentially dangerous dosage.* (Davis.) The facts of that case are inapplicable here, because the student's physician is required to write out detailed orders for administration and the children's parents are required to consent before an unlicensed school personnel can administer insulin according to the physician's orders. Moreover, the dosage of ritalin at issue in Davis that the school nurse refused to administer could have killed the student, whereas here, insulin is needed to control blood glucose and minimize complication to allow diabetic students the opportunity to survive and thrive in their education.

We cannot simply hire more school nurses to administer insulin to diabetic students

You have also requested that the Department of Education hire more school nurses as a solution to your narrow reading of the statutes. Although we believe that our reading of the statutes is sound and that unlicensed school personnel are permitted to administer insulin to students, we do not believe that simply hiring more school nurses would be a viable solution. According to the Columbia Board of Nursing, the state only has 2,800 nurses to serve 600,000 students with disabilities. (Nursing Shortage in Columbia: Policy Advisory.) Although we agree that this is not ideal, the solution is not as easy as simply hiring more nurses. The current shortage of nurses is considered a "public health crisis;" this is attributed to a number of factors. Moreover, Columbia

cannot easily hire additional nurses because there is national shortage of nurses, the nursing educational pipeline is decreasing nationally, nursing programs are oversubscribed, and licensed nurses are less prepared to meet the demands of today's healthcare system. While we agree that this a serious issue, and will gladly work with you to help solve this nursing shortage, it is for precisely this reason that permitting unlicensed school personnel to administer insulin to students with diabetes is so important. Because there are so few nurses per students in schools, we need to make sure any gaps are covered and these students are receiving the medical care they need.

Thank you again for your letter of February 16, 2017. For the reasons above, we respectfully decline to withdraw the Legal Advisory because it is legal, consistent with the statutory construction of the SMA, NPA, and IDEA, and good public policy. We hope that you found our reasoning sufficient, and that you do not feel it is necessary to initiate an action to declare the Legal Advisory invalid. If you do decide to go that route, please know that we are prepared to defend our position in Court. Thank you.

Very truly yours,
James Wood, General Counsel
Columbia Department of Education

PT-A: SELECTED ANSWER 2

COLUMBIA DEPARTMENT OF EDUCATION
300 KING STREET
SPRINGFIELD, COLUMBIA

February 21, 2017

Marilyn Cones, Esq.
Associate General Counsel
Columbia Nurses Association
2000 Franklin Street,
Mapleton, Columbia

Re: Legal Advisory

Dear Ms. Cones:

We have received your demand letter with respect to the Legal Advisory on the "Administration of Insulin to Students With Diabetes" ("Advisory") issued by the Columbia Department of Education ("Department"). The Advisory was issued by our Department on February 10, 2017, and concluded that unlicensed school personnel other than school nurses are authorized to administer insulin to students with diabetes - including by injection - by the School Medication Act ("SMA"), and are not prohibited from doing so by the Nursing Practice Act ("NPA"). Further, it is our position that this interpretation is consistent with Congress's purpose in enacting the Individuals with

Disabilities Education Act ("IDEA").

In your letter, dated February 16, 2017, you asked us on behalf of the Columbia Nurses Association ("CNA") and its members, which include State of Columbia school nurses, to demand that the Department withdraw from the Advisory. We write you today to assert that we will be declining to withdraw the Advisory, as our legal analysis firmly demonstrates that our position is sound. Any other conclusion would yield unreasonable results and run the risk of making the applicable statutes an obstacle to Congressional objectives.

As we gather you have already read through the Advisory, rather than reassert the points stated in the Advisory, the Department will offer its response to your analysis as follows.

1. The School Medication Act authorizes unlicensed school personnel to administer insulin to students with diabetes

In your letter, you stated that Section 3(a) of the SMA does not authorize unlicensed school personnel to "administer" insulin to students with diabetes, only to "*assist"* - i.e. help students administer insulin to themselves. You state as support for your position that the legislative history of the School Medication Act shows that in 2002 the SMA was amended to authorize unlicensed school personnel to administer insulin to students with diabetes, but the Governor vetoed the amendment.

It must be emphasized that in reviewing a statute, if this dispute goes to court, the court's sole task is to effectuate the intent of the legislative body, beginning with the language of the statute construed as to its ordinary meaning (*Davis v Francis Howell School District*). If the words of the statute are ambiguous, the court will: (a) look at extrinsic materials (including legislative history) as a background, and (b) seek to adopt a reading that would yield reasonable results (and reject a reading which would yield unreasonable results) (*Davis v Francis Howell*).

Beginning with an analysis of the statute's ordinary meaning, it must be noted that the words "administer" and "assist" have ambiguous meanings. Section 2 of the SMA reads, "no person shall administer medication to any student in any public school in this state". While, as you suggest, the word "administer" may refer to a task of managing or supervising use of insulin, the word "administer" is also understood to mean, "to give remedially by placing into or onto the body", as with a dose of medicine (21st Century American Dictionary). Further, notwithstanding Section 2, Section 3 of the SMA reads that a student who is required to take medication prescribed for him by a physician may be assisted by a nurse or by other school personnel. You suggest that to "assist" would imply giving support or aid, or to be present during administration of insulin. However, "assist" could also be understood to mean, "to give support or aid to another by doing something for the other" (21st Century American Dictionary). Given the varied meanings of both of these words, a court would likely look to extrinsic materials and adopt whichever reading that would yield reasonable results. On both points, the Department will prevail.

First, the extrinsic materials and legislative history support the Department's conclusion that the SMA authorizes unlicensed school personnel to administer insulin to students with disabilities. Though you offer that the legislative history of the SMA indicates the Legislature attempted to amend it in 2002 to authorize unlicensed school personnel to administer insulin to students with diabetes, and was rejected by the Governor's veto, the information you provide is incomplete. In fact, as legislative history shows, the Governor only vetoed the amendment because, as he stated, "Section 3 'already provides that any student who is required to take... medication... may be assisted by unlicensed school personnel,' and hence already authorizes such personnel to administer insulin to students with diabetes" (see Governor's Veto Message to Assem. on Assem. Bill No. 481 (2002 Reg. Sess.) (Sept. 26, 2002). Thus, rather than opposing the administration of insulin to students by unlicensed personnel, the Governor vetoed the amendment because, in his opinion, this practice was already supported by the legislation.

Second, interpreting the Governor's words in any other way would require the court to adopt a reading that would yield an unreasonable result in light of the Legislature's purpose. The Legislature states that the purpose of the SMA under Sections 1(b)-(c) is to promote the health and safety of students in the public school of Columbia by addressing the severe shortage of school nurses in the state. As will be detailed further below, Columbia is in a serious and concerning school nurse crisis. The rising crisis, the legislative history, and the legislature's stated purpose combine to weigh in favor of a reasonable interpretation which would support a finding that unlicensed school personnel are authorized to administer or assist with injecting insulin to students with diabetes, by injecting the students with insulin.

2. The Nursing Practice Act permits unlicensed school personnel to administer insulin to students with diabetes

The CNA also takes issue with the Department's interpretation of the NPA, arguing that the NPA prohibits unlicensed school personnel from administering insulin to students with diabetes. In your letter, you state that Sections 2 and 3(a) require that no unlicensed person may engage in the practice of nursing, which includes the administration of medication such as insulin. We disagree.

Section 2 of the NPA describes that no person can engage in the practice of nursing without a license. Section 3 of the NPA describes the practice of nursing vaguely, and makes no specific reference to the administration of insulin. Rather, it describes the practice of nursing thusly: helping patients cope with difficulties in daily living associated with actual or potential health or illness problems and treatment which require a substantial amount of scientific knowledge or technical skill. (Emphasis added.) Section 3 of the NPA lists nebulous examples of "the practice of nursing", including: direct and indirect patient care services that ensure safety, comfort, and personal hygiene of patients, administration of medication necessary to implement a treatment, and the performance of immunization techniques and observation of signs and symptoms of

illness. All of these are to be construed in the light of the core of Section 3, which highlights that the practice of nursing includes the performance of a task which requires a substantial amount of scientific knowledge and technical skill.

Administering insulin is not a practice which requires a substantial amount of scientific knowledge and technical skill, evidenced by the fact that many children are able to inject themselves with insulin (U.S. Dept. of Health and Human Services, *Helping the Student with Diabetes Succeed: A Guide for School Personnel* (Sept. 1, 2016)). Further, the SMA contains provisions under Section 4 which provide that students with diabetes are allowed to administer insulin to themselves at school, implying that nurses are not the only people capable of providing the service (and displacing any assumption that the injections may require special skill to administer). Even if this is not the case, the determination of what constitutes a practice which requires scientific knowledge or technical skill is a decision that should not be left to a body which has the mission of lobbying for the nurses who stand to lose a monopoly over health care services as a result of the definition. Rather, the Legislature is best positioned to make decisions for public health, and who are accountable to constituents for these decisions. The Legislature - as above and as will be discussed further below - has evidenced its intent to include unlicensed school staff as permissible people to inject children with insulin, and the NPA should be interpreted accordingly.

Lastly, even if the injection of insulin is a practice that should normally be reserved for a school nurse, it falls within an exception to the practice of nursing under the NPA. In your letter, you state that Section 4(e) of the NPA indicates the practice of nursing includes the administration of medication, even if unlicensed school personnel are acting in accordance with orders issued by a physician. However, Section 4 specifically provides for an exception to the "practice of nursing" where the performance by any person of such duties as required for the physical care of a patient carried out in accordance with orders issued by a physician is permissible, as long as such a person does not hold him/herself out as a ruse. The provisions of the Columbia School Medication Act ensure that such is the case. Section 3 of the SMA contains strict rules

requiring: (i) written orders issued by the student's physician for the administration of the medication (detailing its name, method, amount, and conditions for the administration), and (ii) written consent by the student's parents or guardian indicating a desire that the school district provide assistance to the student. These requirements must be met in order for school personnel - either a nurse or other personnel - to administer medication prescribed to the student by a physician. Thus, the fact that the school district takes specific precautions to gather orders issued by a physician, and obtains written consent from the parents, means that the unlicensed school personnel's administration of the insulin falls into the exception of Section 4(e) of the NPA.

Even though the CNA may disagree with particular aspects of the foregoing, Section 35 requires that the NPA should be construed broadly in order to give effect to the intent of the Legislature, which is to promote the health and safety of the people of this state. Given the nursing shortage and the points discussed above, such a broad interpretation would favor the Department's position.

3. The Individuals with Disabilities Education Act displaces state statutes

The final point in your letter is that the IDEA does not preempt state statutes, or grant students with disabilities any right to medication except as needed. The IDEA was enacted by Congress as anti-discriminatory statutes to grant students with disabilities a right to a free appropriate public education, with a complementary right to health care services, at no cost to themselves or their families (in order to enable them to take full advantage of educational opportunities equally with their peers) (Advisory, see also *Davis v Francis Howell School District*). We agree that students with diabetes have a disability and need medication including insulin; however, we reach different results as to how that help will be provided.

You cite as authority for your position that the IDEA does not displace state statutes the U.S. Dept. of Health and Human Services, *Helping the Student with Diabetes Succeed: A Guide for School Personnel* (Sept. 1, 2016). In actuality, the guide specifically states

that it does not address State and local laws, and should be used in conjunction with Federal as well as State and local laws. Thus, the guide does not support your position.

Furthermore, case law supports the view that any prohibition in state law that stands as an obstacle to the accomplishment of Congressional objectives is preempted under the Supremacy Clause of the United States Constitution (*Hines v Davidowitz*, see also *Davis v Francis Howell School District*). However, the courts may avoid reading a statute in a way as to set up an obstacle to the accomplishment of Congressional objectives and would thereby avoid preemption (*Davis v Francis Howell School District*, see also *Santa Clara County Local Transportation Authority v Guardino*). Either way - a law is construed either in such a way as to avoid a conflict with Congress's intent, or the law will be preempted if it conflicts with Congress's intent. This leads us to conclude that Congress's stated purposes will not be frustrated by state legislation, to the extent that conflict with state legislation exists (as stated above, we do not think such a conflict exists). However, if there is a conflict here, as you claim there is, between state laws and Congress's intent in enacting the IDEA as described above, the state law will be either preempted or read down.

With that in mind, I turn to your claim that the IDEA does not grant students with disabilities any right to medication except as needed, which you support by citing *Davis v Francis Howell School District*. On closer reading of the case, the decision turned on whether students had a right to receive medicine in a potentially <u>dangerous dosage</u> - not whether students had a right to medication as needed. While the court concluded that children with disabilities do not have a right to receive a potentially dangerous dose of medication (e.g., a dose exceeding a recommended maximum by a leading authority vetted by the Food and Drug Administration), it did determine that the health care services to which students with disabilities have a right include the administration of needed medication (*Davis v Francis Howell School District*). There is a wealth of evidence which supports the conclusion that students with diabetes who need insulin (i.e., students with a disability) need insulin injections throughout the school day. Diabetes is a serious chronic illness and must be monitored 24 hours a day, 7 days a

week, and requires careful monitoring of blood glucose levels throughout the school day and by administering multiple injections to ensure children will survive, according to U.S. Dept. of Health and Human Services, *Helping the Student with Diabetes Succeed: A Guide for School Personnel* (Sept. 1, 2016). Further, given the serious nature of the disease, the U.S. Dept. of Health and Human Services suggests that coordination and collaboration among members of the school's heath team - including the school nurse (if any), other school personnel, and the student, along with the student's personal diabetes health team (parents, physician, and the student) - are essential to helping students manage their diabetes in the school setting (U.S. Dept. of Health and Human Services, *Helping the Student with Diabetes Succeed: A Guide for School Personnel* (Sept. 1, 2016)).

Even in light of these facts, the CNA takes the position that "no student with diabetes needs insulin administered by unlicensed school personnel" because, as you claim, insulin is a high-alert medication, and under the advisement of the U.S. Dept. of Health and Human Services, it is too dangerous to be administered by unlicensed school personnel (U.S. Dept. of Health and Human Services, *High-Alert Medications* (Jan. 1, 2017)). This reasoning is flawed.

Firstly, students have an undeniable need for insulin to be administered by unlicensed staff given Columbia's nursing crisis. The State of Columbia Board of Nursing, *The Nursing Shortage in Columbia: Policy Advisory* (Jan. 15, 2017) indicates that there is a severe nursing shortage, likely to become even more severe in the foreseeable future, which jeopardizes the health and well-being of the state's citizens. In particular, the advisory warns that Columbia faces an ever-increasing school nursing shortage, especially in serving 14,000 disabled students (of the over 6 million student population) with only 2,800 nurses. Only 5% of schools have a school nurse full-time, 69% have a school nurse part-time, and 26% have no school nurse at all. This problem is set to only get worse, as there is a projected shortfall of 25,000 nurses over the next five years, Columbia cannot easily obtain additional nurses, and the educational preparation of nurses is inadequate to meet the demands of today's health care system (The State

of Columbia Board of Nursing, *The Nursing Shortage in Columbia: Policy Advisory* (Jan. 15, 2017)). Given that nurses are so rarely available to disabled students and that the situation is set to deteriorate even further, and given disabled students' pressing need for regular glucose monitoring and insulin injections throughout the day and on field trips, students must be able to have insulin injections administered by unlicensed school staff now and in the future, as these staff are more readily and regularly available (which is suited to the disabled students' unique needs given their condition).

Second, the U.S. Dept. of Health and Human Services' report on *High-Alert Medications* simply says that there's a heightened risk of patient harm when insulin is used in error. The steps the report suggests to avoid error are: improving access to information about the substances; limiting access; using auxiliary labels and automated alerts; standardizing ordering, storage, preparation, and administration; and employing redundancies such as automated or independent double checks when necessary. The Department repeats its earlier assertion that in compliance with the SMA, the unlicensed school personnel are closely guarded to ensure that their administration of insulin is done in accordance with detailed orders from a physician. Indeed, these are the same directions and information supplied to the school nurses. The Department asserts that there is no heightened risk of error in administration of the insulin simply because an unlicensed school staff member is administering it. (If you have any further doubts as to this point, please see the Department's analysis above re: the fact that administering insulin does not require special skill or knowledge.)

In essence, the Department is confident in the correctness of its Legal Advisory, and finds the CNA's analysis flawed. Properly construed, under the School Medication Act, unlicensed school personnel may administer insulin to students with disabilities without offense to the Nursing Practice Act (and in accordance with the Individuals with Disabilities Education Act). Such a conclusion is the only reasonable conclusion given Congress's stated objectives. As such, the Department is confident that it will prevail if the CNA initiates an action to declare the Legal Advisory invalid as contrary to law, and we refuse to withdraw the Advisory.

The Department urges the CNA not to waste its members' time and resources in litigation. Rather, the Department encourages the CNA to use its resources to support its membership and train new nurses to combat the public health crisis attributable to the projected shortfall of nurses (e.g., perhaps lobbying for a wider variety of nurse training and education opportunities would be a more fruitful endeavor).

The Department accordingly urges the CNA to withdraw from its position and to do what is both advisable and imperative - to refrain from challenging a Legal Advisory that is correct both in law and in spirit.

Yours respectfully,

James Wood

James Wood

February 2017

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

CLAIM BY BLANCHARD ENGINEERING, INC.
AGAINST CITY OF CORSON

CLAIM BY BLANCHARD ENGINEERING, INC.
AGAINST CITY OF CORSON

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no parameters on how to apportion your time, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Trammell, Simmons and Volz, PC

433 Corson Courthouse Square

Corson, Columbia

MEMORANDUM

TO: Applicant

FROM: John Trammell

DATE: February 23, 2017

RE: Claim by Blanchard Engineering, Inc. against City of Corson

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We have received a request from Mike Bryant, the city attorney for the City of Corson, to evaluate a potential lawsuit against the City. Blanchard Engineering, Inc. performed services for the City as part of a potential upgrade to the City's wastewater treatment plant.

However, Blanchard claims that the City owes it over $200,000 for services rendered pursuant to discussions that never resulted in a contract formally approved by the City Council. Blanchard sent an invoice to the City requesting payment, which the City has denied. Blanchard acknowledges that the contract never received a formal vote from the City Council. However, Blanchard's attorney has told the city attorney that, unless this case settles, Blanchard intends to file suit on a *quantum meruit* claim.

Please prepare an objective memorandum answering these questions:

1) Whether the City is immune from Blanchard's claim for *quantum meruit*.

2) Whether Blanchard can prove its claim for *quantum meruit.*

3) How a court might go about evaluating damages if Blanchard were to recover under *quantum meruit*.

Do not prepare a separate statement of facts, but make sure to use the facts in your analysis of the questions.

CITY OF CORSON

OFFICE OF THE CITY ATTORNEY

800 Main Street

Corson, Columbia

MEMORANDUM

TO: John Trammell

FROM: Mike Bryant, City Attorney, City of Corson

DATE: February 22, 2017

RE: Claim by Blanchard Engineering, Inc. against City of Corson

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John: This memo asks your firm to assess a potential claim by Blanchard Engineering, Inc. against the City of Corson. Blanchard has demanded payment on an invoice it sent to the City, for services it began and completed before the last election. The new mayor and City Council refused payment in January 2017. Blanchard's lawyer called me several times to indicate that his client takes its demand seriously, and will file suit unless we can work something out. If the City decides not to settle, I anticipate asking your firm to handle the litigation.

Briefly, this dispute involves services that Blanchard rendered in connection with the City's efforts to upgrade its wastewater treatment facility, which the City owns and operates. The City hired Blanchard to help it put together an application for a state infrastructure grant to upgrade the plant. The City entered into a distinct contract, approved in compliance with the City Charter, to get Blanchard's initial advice on how to prepare an application for this funding. Blanchard provided that advice and the City paid Blanchard. That contract is not in dispute.

On June 10, 2016, Mayor Justine Reyes presented me with a new proposal from Blanchard, encompassing additional work in pursuit of the grant. On the same day, I

drafted a proposed contract embodying those terms and returned it to Mayor Reyes for further handling.

The progress of discussions concerning the June proposal appears in my interview notes with Mayor Reyes. She spoke with Bill Blanchard on June 13, 2016, and committed to bring the June proposal to the City Council for review and approval. For various reasons, that did not occur until August 8, 2016. The meeting that day was a public meeting; present were myself, Mayor Reyes, a majority of the Council and Bill Blanchard. I attach a transcript of all portions of the meeting concerning Blanchard's work. As you will see, I had signed a copy of the June proposal, as had Bill Blanchard, but the proposal never received a formal vote, and no entry concerning the June proposal ever appeared in the council journal.

By October 2016, Blanchard had completed substantially all of the work detailed in the June proposal. However, on October 18, 2016, we learned that the City of Corson's application for infrastructure funding was denied. Renovation of the facility never began.

On election day in early November 2016, Mayor Reyes lost her re-election bid. Moreover, because of attrition and contested seats, a majority of the council seats changed hands. In general, the new mayor and new council members articulated a more fiscally conservative position than the outgoing holders of those seats. The new mayor and Council came into office in early January of this year.

Blanchard submitted its invoice in mid-November 2016, but the City took no action before the new administration came into office in January 2017. After that, the new mayor contacted me about Blanchard's invoice. He indicated that, in his view, Blanchard had no claim. He said that, since the City didn't get the grant, he didn't think that the City got any value from Blanchard's work. The City wrote Blanchard in January 2017, refusing to pay the invoice.

In the conversations I have had with Blanchard's attorney, he acknowledged that the June 2016 proposal had never received a final vote. At the same time, he indicated his belief that the City got exactly what it bargained for, on time and under budget.

CITY OF CORSON

OFFICE OF THE CITY ATTORNEY

800 Main Street

Corson, Columbia

MEMORANDUM

TO: File

FROM: Mike Bryant, City Attorney, City of Corson

DATE: February 13, 2017

RE: Claim by Blanchard Engineering, Inc. against City of Corson

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I spoke with former Mayor Justine Reyes about her contact with Blanchard Engineering and Bill Blanchard in the course of their work on the City of Corson wastewater treatment facility. This memorandum summarizes what she told me. I believe that, if required to do so, she will testify consistently with the facts stated in this memorandum, and that she will be credible.

Mayor Reyes became mayor in 2012. The City experienced slow but steady growth during her tenure. It became increasingly clear that the City's wastewater treatment facility could not keep up with the demand posed by the growing population. The facility badly needs upgrading. It also became clear that the City could not afford major expenditures on improvements to the facility. Mayor Reyes held periodic conversations with representatives of various state and federal regulatory agencies about the facility. Those representatives made clear that, while the facility was currently in compliance, it would fall out of compliance within the next several years. Mayor Reyes understood the representatives to say that failure to upgrade the facility could result in fines totaling several million dollars.

In the fourth year of her term, Mayor Reyes became aware of state grants that would support infrastructure projects, including improvements in wastewater treatment facilities. After some research, she entered into an arrangement with Blanchard Engineering, Inc., an engineering firm from Columbia City with whom neither she nor the City had had prior dealings. Blanchard had expertise in designing and managing wastewater treatment facilities, and in assisting state and local governments in obtaining funding for significant wastewater improvement projects.

Reyes arranged for Blanchard to give the City advice on the steps the City would have to take to obtain the state funding. Blanchard did so promptly, and received payment for that advice from the City. That advice made clear that, in order to qualify for the funding, the City would need to prepare actual design engineering specifications, since the project needed to be "shovel-ready" by November 2016. This work included assessment of the facility's existing capacity, analysis of the relevant EPA and Columbia EPA regulatory requirements, preparation of specific engineering and building designs, negotiations with contractors and suppliers, and applications for relevant permits and permissions. Blanchard Engineering prepared a proposal to accomplish this work for $210,000. It presented that proposal to Mayor Reyes on June 9, 2016.

Mayor Reyes obtained a draft contract based on those terms from the city attorney on June 10, and met again with Bill Blanchard on June 13. On that date, Bill Blanchard told Mayor Reyes that it would take almost the entire time between then and November to get the project "shovel-ready." He wanted assurances that the City would follow through on the contract if Blanchard invested its time and expertise in the project. Mayor Reyes assured him that she had the support of the City Council, and that she would present the contract for review and approval by the Council at the earliest opportunity. She told Blanchard to go ahead with the project.

Mayor Reyes did not get the project on the council agenda until August 8, 2016. She indicated that a transcript of that meeting would provide full details about what was said. However, she confirmed that, while all seven members of the Council voiced support for

the June proposal, due to the press of business, the Council did not vote on the June proposal. She also confirmed that no vote was ever taken, nor was any note of the Council's opinion ever entered into the council journal. Mayor Reyes explained that neither she nor the Council thought that the project posed a controversial issue. Moreover, she and many council members were locked in difficult re-election fights, which distracted them through much of the fall.

Mayor Reyes received regular reports from Blanchard Engineering and Bill Blanchard on progress under the plan. By October 14, 2016, preparations were substantially complete, and Blanchard had delivered all its designs for the plant, along with a full schedule for construction, to Mayor Reyes. On October 18, 2016, the City received notice that its application had been denied. Slightly over two weeks later, Mayor Reyes lost her re-election bid.

She remained in her position as mayor through the beginning of January 2017. When the invoice from Blanchard Engineering arrived in November, Mayor Reyes consulted with the incoming mayor, who told her not to take action on it, but to leave it for him and the incoming City Council to handle.

TRANSCRIPT
CORSON CITY COUNCIL MEETING
August 8, 2016

Mayor Reyes called the roll. All council members present, including the Mayor, Council Members Frank, O'Bryan, Finzler, Manton, Sidney, and Baldwin. Also present: City Attorney Bryant, Mr. William Blanchard.

Abbreviations:
CM = Councilman
CW = Councilwoman

Mayor: I see that all are present . . . .

* * * *

Mayor: I want to turn to the wastewater treatment facility issue now. Mike Bryant, as city attorney, has some information for us. We also have Bill Blanchard from Blanchard Engineering on hand to give us an update. Mike, would you start us off?

Attorney Bryant: Yes, Madam Mayor. As the Council can see from the notice of today's meeting, the City got advice from Blanchard Engineering, Inc. in May on how to apply for funding to upgrade the wastewater treatment plant. That told us that the improvement project had to be ready to go as of mid-November. Madam Mayor, do you want to say more about this?

Mayor: Of course. In working with Bill Blanchard, we realized that we have to get the whole project ready to start on November 15th of this

year. To do that, we have to have a design; we have to have permits; we have to have contractors and subcontractors and suppliers and what have you; we have to have the EPA and the Columbia EPA signing off . . . and if we don't have all of this in time, we won't get the funding. It was my judgment that there was no way that we could do this on our own. I also knew that the City had to do this; we can't rely on a private utility to take this off our hands.

So I talked with Bill Blanchard, who had been doing really great work for us. He said that his firm could do it on a short deadline, so he put together a proposal. I ran it by Mike Bryant, who drafted a contract for me to talk over with Blanchard. On my authority, Blanchard got started in mid-June.

Attorney Bryant: The contract that you have in your hands today was the one that I prepared for Mayor Reyes in June. The City Charter requires that I review and sign it before you vote on it, which I have done. You'll see that Bill Blanchard has signed it on behalf of Blanchard Engineering. The only thing left to do is for the Council to vote, and then to enter it into the council journal.

Mayor: Maybe in a minute we can hear from Bill Blanchard about his progress on the project. But first I want to see if you have questions about this. Before you do, I want to say that I would not have authorized this without having talked with each of you privately beforehand. I think I remember having your okay then. And let me say that this is a great chance to improve a key component of our infrastructure at minimal cost to the City.

CM Frank: I remember, Justine. I agree that this is a good project, and see no reason not to move forward. I'll want to hear from Bill Blanchard about progress though, and the chances that we'll get the money.

Mayor: Okay.

CW O'Bryan: I remember this project from May. I remember thinking then that the application would be harder than we thought. So it makes sense that we get some expert help with this.

Mayor: Any other questions or comments?

CM Finzler: None here. I'm comfortable with this direction.

CM Manton: I have only one question. If I read the contract right, you're going to need $200,000 . . . no, $210,000 to get this project ready. Is that right, Mr. Blanchard?

Mr. Blanchard: That's correct.

CM Manton: That's a lot of money. The Mayor's told us why she thinks it takes that much. Can you explain it in your words?

Mr. Blanchard: Of course. The funding application requires that the funds be committed within the fiscal year of award. Since the City's fiscal year runs until June 30, an award this year would require you to begin construction on improvements no later than mid-November of this year. That means all conditions necessary to start construction have to be satisfied by that time. These conditions include creating a design for the improvements, something for which we already have substantial expertise, and which we can do within very tight

time limits. Some other conditions take a little more time, but can also be accomplished fairly quickly. For example, finding and negotiating with contractors and suppliers.

But some of these conditions take months to complete. For example, the City has to obtain several different permits from several different agencies, and has to file regular periodic reports at defined intervals with specific bodies. We cannot reduce these time periods, and needed to get started in mid-June to make sure the City was ready in time.

All of these activities require us to devote staffing and resources in a coordinated and efficient way. With a longer term project, we could invest fewer teams, and perhaps save some staff time. With the shorter time period, we had to have multiple teams working simultaneously. Overall, the contract amount of $210,000 represents good value for a project of this size and time sensitivity.

CM Manton: Thank you. That was very clear. No objections here.

CW Sidney: Mayor, I'm worried that you didn't get formal council approval for this contract before they started work in June. Could we have avoided that?

Mayor: I'm afraid not. You all remember the budget mess we faced in late June and July. I think I'm right in saying that we had to deal with that mess first. This is the earliest we could take this up.

CW Sidney: I don't have any objection to the project. It's just that, what if we don't get the grant?

Mayor: Then we're committed to pay Blanchard. There's no guarantee that we'll get the grant. This just puts us in the best position to get the funds. That's what we're getting.

CW Sidney: Why do we have to upgrade the wastewater treatment plant at all?

Mayor: Well, first, the agencies are forcing our hand. And we're the ones who have to do it. The private market won't step in to do it for us.

CW Sidney: Okay. No objection.

CW Baldwin: I'm interested in how the work is going. Mr. Blanchard, could you give us an update on your progress?

Mr. Blanchard: Yes . . . .

* * *

CW Baldwin: So you're telling us you're optimistic about our chances.

Mr. Blanchard: Let me stress, Councilwoman, that these applications are very competitive. I know from reliable sources that many cities in the region are going after these funds. But we think that you make a compelling case for need, given your population growth and your facility's condition. And we have confidence in our ability to make a convincing proposal for upgrade.

CW Baldwin: I'm sold! You should do this for a living, Mr. Blanchard!

[Laughter]

Mayor: Okay. Okay. Thank you, Mr. Blanchard. I think we've heard what we need to from members of the Council. I note for the record that Attorney Bryant has had to go. I'm also worried about time. We have to make sure to deal with the complaints about police conduct in District 3. Shall we turn to that next?

* * * *

Blanchard Engineering, Inc.

Innovation – Imagination – Integrity

4345 Battlefield Industrial Park
Columbia City, Columbia
accounting@blanchengineers.com

INVOICE

For services rendered to:
City of Corson
Justine Reyes, Mayor
1 Town Hall Plaza
Corson, Columbia

Contract Date: June 13, 2016

Contract Name: City of Corson Wastewater Treatment Facility Upgrade

ITEMIZATION

TIME AND LABOR:

Review and analysis of existing facility	$15,000.00
Assessment and analysis of EPA and Columbia EPA mandates	$25,000.00
Design of upgraded wastewater treatment facility	$75,000.00
Applications for permits, variations, etc.	$40,000.00
Preparation of reports to EPA / CEPA	$10,000.00
Negotiations with subcontractors and suppliers	$25,000.00
MATERIALS:	$13,409.00
TOTAL DUE:	$203,409.00

Dated: November 15, 2016

B. Blanchard
Bill Blanchard, President

February 2017

California Bar Examination

Performance Test B

LIBRARY

CLAIM BY BLANCHARD ENGINEERING, INC.
AGAINST CITY OF CORSON

LIBRARY

Corson City Charter Section 17-4 .....

Lyman v. Town of Barnet
Columbia Supreme Court (1958) .....

Galax Consultants, Inc. v. Town of Avalon Beach
Columbia Supreme Court (1994) .....

Hiram Grant Partnership v. City of Vanderbilt
Columbia Court of Appeals (2005) .....

Corson City Charter Section 17-4

No contract with the city shall be binding on the city unless the contract is in writing, is signed after review by the city attorney, and is approved by the city council subsequent to its signature by the city attorney, with such council approval entered on the council journal.

Lyman v. Town of Barnet

Columbia Supreme Court (1958)

Mrs. Estella Lyman filed an action against the town of Barnet for two purposes: first, to establish whether her property lies within the town's corporate limits; and second, if her property falls within the town, to get reimbursement for a water line that she constructed to obtain water from the town water supply. The trial court determined that her property lay entirely within the town, but denied her request for reimbursement. Mrs. Lyman appeals.

The facts are not in dispute. Mrs. Lyman's property has been wholly within the corporate limits of Barnet since the land was sold to her. However, through an error, both town and county officials treated the property as lying outside the town but within the county. As a result, the town refused to supply it with water. When Mrs. Lyman constructed her own line, the town charged her an increased rate for the same reason. Mrs. Lyman paid taxes to the county, and not the town.

Several years after she built the water line, Mrs. Lyman upgraded it to a higher capacity pipe. At the same time, she subdivided her property, and sold off several lots to purchasers who built residences on their lots. The town connected these residences to the pipe laid by Mrs. Lyman, and collected water rents from each of these new owners.

In 1954, the town resurveyed its boundaries, as part of a potential annexation of several unrelated portions of the county. During this resurvey, a town official informally notified Mrs. Lyman that the resurvey tentatively indicated that her property lay within the town. Despite this, the town continued to charge Mrs. Lyman a higher rate, while also supplying water to other users off of the common pipe that she had built. After several years of unsuccessful negotiation, Mrs. Lyman filed this suit.

We think that the present case must be decided upon the principles of *quantum meruit*. The line became a part of the town water system and was used by the town in its water business. It produced valuable water rentals and now accommodates many families. Where a town takes over and controls a water line built by others and uses it for the benefit of the town and consumers generally, and through it delivers water for a profit, it is obligated to pay those who constructed the line on a *quantum meruit* claim.

The town contends that it entered into no contract with Mrs. Lyman, other than the contract to supply her with water. Moreover, the town contends that it cannot be bound to pay for facilities that it uses in its governmental capacity.

A function is governmental in nature if it is directly related to the general health, safety, and welfare of the citizens. In contrast, a function is proprietary in nature if the municipal corporation provides a service that other private commercial businesses also provide, and that benefits the municipal corporation financially. When a municipality operates a water plant, it acts in its proprietary capacity by exercising business functions that another private business might also have provided. In such a case, the municipality must comply with the same rules that apply to private corporations or individuals engaged in the same business.

A municipality may become obligated under *quantum meruit* to pay the reasonable value of benefits it has accepted or appropriated, provided it has the power to contract on that subject matter. In such a case, the municipality can be held liable where, with the knowledge and consent of the members of the council, it has received benefits procured by its agents, either without a contract or where an express contract is invalid because of mere irregularities.

To be sure, Mrs. Lyman must still establish the elements of a claim for *quantum meruit*. To recover under this doctrine, a plaintiff must establish that: 1) valuable

services and/or materials were furnished, 2) to the party sought to be charged, 3) which were accepted by the party sought to be charged, and 4) under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient.

In this case, the trial court denied Mrs. Lyman's request for reimbursement on the grounds that the law provided her with no remedy against the town. Mrs. Lyman had no opportunity to offer evidence on the elements of her *quantum meruit* claim. Accordingly, we reverse this portion of the trial court's order, and remand the case for trial on the *quantum meruit* claim.

Reversed and remanded.

Galax Consultants, Inc. v. Town of Avalon Beach

Columbia Supreme Court (1994)

Plaintiff Galax Consultants, Inc. (Galax) appeals from a judgment of the trial court in favor of the defendant, the town of Avalon Beach (Town). The trial court held that, although Galax had proven all of the requirements of *quantum meruit* against the Town, immunity precludes Galax's recovery in this case. In addition, the trial court addressed the issue of damages in the event that Galax should prevail on this appeal. Galax appeals this portion of the trial court's ruling as well.

In the spring of 1988, the Town owned a ballpark in Avalon Beach, which it had contracted to sell to Banyan Partners, Inc. (Banyan). Banyan orally agreed with Galax for Galax to perform repairs and renovations to the ballpark. Galax completed the work in a competent manner and within a tight timetable, and the park was ready for the 1988 baseball season.

The purchase and sale agreement between the Town and Banyan required the Town to reimburse Galax for the costs of any repairs that Galax might make, even if the sale did not go through. The purchase and sale agreement was executed in compliance with the city charter. Moreover, testimony at trial indicated that the town manager had promised Galax that the Town would require any other purchaser of the ballpark to pay Galax what it was owed. The sale to Banyan did not take place; the Town operated the ballpark that summer and then sold it to another buyer. However, the Town absolved that buyer of liability for expenses incurred prior to the sale, including Galax's bill.

Galax sued Banyan and the Town for $61,479, and obtained a judgment against Banyan. (Banyan has paid only $10,000 of that judgment.) However, the trial court granted the Town's motion for judgment notwithstanding the verdict, on the ground that Galax could not maintain a *quantum meruit* suit against a city.

At trial, Galax offered evidence in support of its claim for $61,479. This consisted of physical improvements to the park of $35,000, overhead costs of $20,000 and anticipated profits of $6,479. In that portion of its ruling dealing with damages, the trial court ruled that, should Galax prevail on appeal, it should receive only the actual value of improvements to the park, and not the other two items.

The trial court erred in denying Galax's *quantum meruit* claim. No question exists that the Town owned and operated the park in the exercise of its proprietary function. Galax has proven that it has conferred a benefit on the Town in circumstances where it would be unfair for the Town to retain that benefit were it not a municipality. In such a case, a plaintiff should not be barred from recovering the retained benefit *solely* because the defendant is a municipality. This reasoning comports with our longstanding precedent. *Lyman v. Town of Barnet* (Col. Supreme Ct. 1958).

The trial court limited Galax's damages to the value of the physical improvements to the ballpark. The measure of damages for *quantum meruit* is the value of the benefit actually received and retained by the defendant. A plaintiff may prove the value of this benefit by proving not only the value of physical improvements, but also the value of work, labor, services and materials furnished. Other points of proof may include: the increase in the sale price of the property resulting from the plaintiff's work; the value of the risks avoided as a result of the plaintiff's work (e.g., through design and installation of safety measures); and similar items.

The trial court appears to have categorically excluded Galax's overhead expenses and profit from its calculation of the benefit received by the Town. Such a blanket exclusion of a plaintiff's overhead, costs, and profits is improper.

We therefore reverse, and remand for reconsideration of Galax's damages.

Reversed and remanded.

Hiram Grant Partnership v. City of Vanderbilt

Columbia Court of Appeals (2005)

The City of Vanderbilt (City) negotiated the purchase of a right-of-way from appellant Hiram Grant Partnership (Partnership). A written nine paragraph contract memorialized the resulting agreement. In Paragraph 4 of the contract, the City agreed to reclaim wetlands on property owned by the Partnership and to employ a wetlands specialist to do so.

The mayor and two council members executed the contract on the City's behalf. However, those three officers did not constitute a quorum, as defined by the City's charter. The city attorney did not review or sign the contract, nor did the city council approve it, both of which are required by the City's charter.

The City performed most of its obligations under the contract, including payment of all money due to the Partnership. However, the City failed to perform its obligations under Paragraph 4. It did not reclaim the wetlands, nor employ a wetlands specialist. The Partnership requested voluntary compliance with Paragraph 4, but the City refused.

The Partnership sought a court order to compel the City to validate the contract by entering it into the council's official minutes. The Partnership argued that the City was estopped from denying its obligations under the contract, given both the explicit terms and its substantial performance of all other parts of the contract. The City argued that the entire contract was *ultra vires* because neither that city council nor the city attorney has approved it, nor had it been recorded in the council's official minutes.

The trial court denied Partnership's petition, holding that because the contract was *ultra vires,* it was not legally binding on the City. The Partnership filed this appeal.

A municipality has no inherent power. It may only exercise power to the extent the state has delegated it the authority to act. Accordingly, we must construe a municipality's allocations of power from the state strictly. If a local government enters a contract in abrogation of its delegated power or in excess of its authority to enter contracts, then the contract is deemed *ultra vires* and void.

The exact status of a defective contract depends upon the type of limitation that the local government has ignored in making it. An imperfect or irregularly executed contract may not necessarily be completely ineffective, as long as it falls within the type of contract that the municipality has the power to make. But if the imperfection or irregularity places the contract completely beyond the power or competence of the local government, then the contract is *ultra vires*: it becomes an absolute nullity.

Where a city charter specifically provides how the city must make and execute a municipal contract, the city may only do so in the method prescribed. A municipality's method of contracting, once prescribed by law or charter, is absolute and exclusive. In this case, the General Assembly enacted the City's charter, which in turn sets forth the parameters of the City's authority to take official action, including its ability to enter into contracts.

The City’s charter provides in relevant part that: the Mayor may sign contracts when authorized by the city council to do so; a quorum of the council requires at least three council persons and the Mayor; no contracts shall bind the City unless approved by the council; and the city attorney must either draft the contract or review it before authorization by the council. In this case, the undisputed facts indicate that the city attorney neither drafted nor reviewed the contract before the Mayor and two council members signed it. Only two council members approved the contract; no quorum was present.

Thus, the City entered the contract outside of its limited grant of authority; in other words, the City acted beyond the power or competence of the local government. We have no choice but to conclude that the contract is *ultra vires,* null and void.

This is not a case where the City simply exercised its legitimate powers in an unusual or irregular fashion. Rather, it involves a situation where the City acted with a total absence of power and in direct contradiction to the strictures of its charter. Where, as here, a municipality contracts with a total absence of power, it is not estopped from denying the resulting agreement's validity.

Accordingly, the Partnership cannot seek whole or partial performance of the contract through mandamus or other means. Moreover, the City's substantial performance under the contract will not be treated as a ratification. Furthermore, the City is not estopped from asserting the contract's invalidity, even though the Partnership has performed its part of the bargain and might even have relied upon the contract to its detriment.

We are not persuaded by appellant’s reliance on *Wreck-It Co. v. City of Lossoth* (Col. Ct. App. 2001). In that case, a wrecker company sued the city on a *quantum meruit* theory to recover for the cost of storing vehicles seized by city police. The company had entered into the storage arrangement orally with members of the police department; the city charter required that all contracts “other than for the ordinary needs of the city” be in writing. The Court of Appeals held for the company, stating that “provided a contract is within the scope of its corporate powers, a municipality may be held liable on a contract implied in law, to prevent the municipality from enriching itself by accepting and retaining benefits without paying just compensation.” The court in that case did not address the *ultra vires* arguments presented by appellee in this case. Moreover,

the city charter provisions differ. There, the storage of vehicles seized by police arguably falls within the "ordinary needs of the city."

Our conclusion here may appear unfair, but compelling policy concerns support it. The limitations placed on the City's ability to contract include numerous checks that prevent improper action by the City, and protect against disastrous consequences for taxpayers.

To allow an *ultra vires* agreement to appear effective in any sense, even quasi-contractually, would amount to a license to local government to expand its own powers without state legislative delegation. Indeed, this would annul the limitation itself and permit the local government to do indirectly that which it could not do directly. It would be but a short step to governmental extravagance with unreasonable risks and liabilities heaped upon the shoulders of local taxpayers. A strict rule of absolute nullity will nip these dangerous tendencies at the outset.

Because the City acted without any power, we conclude the trial court did not abuse its discretion in denying relief that would have compelled the City to validate the contract.

Judgment affirmed.

Judge Bandy joins this opinion.

Judge Quantrill issues the following dissenting opinion:

I dissent. Our Supreme Court's cases make clear that claims for *quantum meruit* may be sustained, even where the City has not fully complied with formal requirements for contracting under the city charter. *Lyman v. Town of Barnet* (Col. Supreme Ct. 1958); *Galax Consultants. Inc. v. Town of Avalon Beach* (Col. Supreme Ct. 1994). Cities should not be unjustly enriched at the expense of an

innocent plaintiff by the simple expedient of failing to comply with purely formal requirements in the city charter.

PT-B: SELECTED ANSWER 1

Memorandum

To: John Trammell
From: Applicant
Date: February 23, 2017
Re: Claim by Blanchard Engineering, Inc. against City of Corson

This memorandum is prepared for the City Attorney (Mike Bryant or "A") of the City of Corson (C) regarding a potential lawsuit against C by Blanchard Engineering, Inc. (B). The purpose of this memorandum is to evaluate the potential lawsuit that B would bring for services B performed for C as part of a potential upgrade to C's wastewater treatment plant. B claims C owes B over $200,000 for services rendered to the City. The following discussion assesses the validly of claims and the potential outcomes of the possible future litigation.

1. Is the City Immune from Blanchard's Claim for Quantum Meruit?

The issues to be discussed here are whether C is engaged in an proprietary function or a governmental function. And if the C is performing a governmental function, whether the C is engaged in an ultra vires action.

Type of Function

Generally, immunity depends on whether a city was performing a government function or a proprietary function. Lyman v. Town of Barnet (Co. S. Ct. 1958). A function is governmental in nature if it is directly related to the general health, safety, and welfare of the citizens. Id. In contrast, a function is proprietary in nature if the municipality provides a services that other private commercial

businesses also provide, that benefits the Municipality (M) financially. Id. Lyman, for instance, held that when a M operates a water plant, it acts in its proprietary capacity by exercising its business functions that another private business might also have provided. When a M is performing a proprietary function, it must comply with the same rules as private corporations or individuals engaged in the same business. In addition, it should be noted that a plaintiff should not be barred from recovering the retained benefit solely because the defendant is a M. Galax Consultants, Inc. v. Town of Avalon Beach (Co. S. Ct. 1994).

Proprietary Function

Here, it is possible that C was performing a proprietary function. The City was performing a function in which it was attempting to upgrade its wastewater treatment facility (WTF). Obviously, this function is very similar to the water plant operated in Lyman that was considered proprietary. Thus, it is possible that a court could construe operating a WTF as a proprietary function because this is a business that other private parties could potentially run. In addition, it is possible to make a profit from operating this type of business. In addition, a court could also see this is a similar situation to Galax in which the Town of Avalon Beach owned a ballpark and contracted with Galax Consultants to perform repairs and renovations to the ballpark. That was a proprietary function because the town was making money from running the ballpark and even was intending to sell the ballpark to a private party. That indicated that it was capable of being performed by a private party. Thus, it could be determined C is engaging in a proprietary function.

Governmental Function

However, it is also possible, and maybe even more likely, a court could decide that C is performing a governmental function. That is defined above, and this

could certainly qualify. First, because Mayor Reyes (MR) stated at the city council meeting that the C cannot rely on a private utility to take this off the C's hands. This means that a private company could not have performed the function. Also, this project would greatly benefit the health, safety, and welfare of the C's citizens. This is because in 2012 after MR was elected, the C experienced slow and steady growth during her tenure. Because of the growth it became increasingly clear that the C's WTF would need upgrading badly because it could not keep up with demand. Also, MR discovered that although the WTF was currently in compliance, it would fall out of compliance within the next several years. If the WTF would fall out of compliance it could lead to fines in the several million dollar range. Thus, not only could the citizens be harmed by issues with the WTF not functioning properly and causing backups and health/safety risks. In addition, the fines to the C would be substantial and would either have to be paid using the citizens' tax dollars or by cutting other programs the C provides to the citizens which harms the citizens' welfare.

In addition, this could be seen more like the function in Hiram where the City of Vanderbilt purchased a right of way from a partnership. In that case, the C was obligated to reclaim wetlands and employ a wetlands specialist. Hiram Grant Partnership v. City of Vanderbilt (Co. Ct. App. 2005). That could be seen as similar to the C's obligations with the WTF because it is for the health, safety, and welfare of its citizens. Thus, it is possible and maybe even more likely that the City could be found to be performing a governmental function.

Results of Function Determination

As stated above, it is possible the C could be found to be performing a private function. Thus, in accordance with case precedent, C would not be immune from liability because it was engaging in a proprietary function and will be held to the same standard as a private business (like in Lyman), making C subject to liability for quantum meruit. This means, like in Lyman, that since C acted with

knowledge and consent of the members of council, the C can be liable in a quantum meruit suit.

However, it is equally possible and maybe more likely the C could be found to be performing a government function because of the reasons discussed above. In that case, the City would be immune in certain instances (if engaged in ultra vires act - discussed below).

Ultra Vires Acts of a City

If a city engages in an ultra vires act, it is likely not binding on the city. Hiram Grant Partnership v. City of Vanderbilt (Co. Ct. App. 2005). In general a M has not inherent power. It may only exercise power to the extent the state has delegated it authority to act. Id. Courts construe Ms allocations of power from the state strictly. Id. Thus, if a M enters into a contract in abrogation of its delegated power or in excess of its authority to enter into contracts, then the contract is deemed ultra vires and is void. However, the status of a defective contract depends on the type of limitation the local government ignored in making it. Id. For instance, if a contract is imperfect it might still be effective if the M has the power to make it. A contract is void and an absolute nullity only if it places the contract completely beyond the power or competence of the M.

When There is a Formal Procedure to Follow

If there is a charter that provides how a city must make and execute a M contract, the city may do so only in the method prescribed. Here, the Corson City Charter Section 17-4 allows a contract to be binding on the C only if: (1) it is in writing, (2) the city attorney reviews the contract and then signs it, (3) after the city attorney signs, it is approved by the City Council, and (4) the council approval is entered into the council journal. The requirements are similar to the requirements in Hiram because in that case, the charter provided that the mayor

sign contracts when authorized by the City Council, a quorum requires at least three council persons and the mayor, and the city attorney must either draft the contract or review it before authorization by the City Council. However, Hiram can be distinguished from the Cs situation because in Hiram it was undisputed that multiple parts of the charter were not followed. In Hiram, the city attorney did not draft or review the contract before the major and two city council persons signed it. In addition, there was not a quorum present, thus it was not possible to approve the contract for the mayor's signature. Thus, in that case the City entered into a contract outside of its limited grant of authority.

Analysis of C's Procedure

Here, C's situation is different. First, this is because the contract was in writing because a draft was prepared by A. In addition, A reviewed and signed the contract before it was presented to the Council on June 8th. Next, under the transcript of that June 8th meeting, the City approved the contract verbally by giving consent memorialized in the meeting notes. All six members of the Council voiced either that they did not have an objection to the project, thought it was a good project, or were sold. Although some members had questions they all ultimately approved in some fashion. In addition, the seventh member, the Mayor, proposed it and impliedly approved. It could certainly be argued that there was no formal vote to approve the project. This would be a compelling argument, except it is clear from Corson City Charter Section 17-4 that a formal vote is not required. Thus the contract was likely approved validly by the City. There is one remaining requirement that is an issue. It is apparent that the approval was never entered into the council journal; it was only recorded in the June 8th meeting transcript. Thus, it is possible a court could be very strict and determine the act was ultra vires for that reason.

However, it should be noted that in Hiram, the court stated that something is not ultra vires if a M exercised its legitimate power in an unusual or irregular fashion.

This was the case for C because it did not formally vote or record the approval in the council journal. Hiram was actually more concerned when a C acted with total absence of power and in direct contradiction to the strictures of the charter, as was the case in Hiram because the charter was clearly violated. That is not the case for C because it essentially complied with only a small minor recording error that was harmless.

In essence, C's situation is similar to Wreck-It Co. v. City of Lossoth (Co. Ct. App. 2001). In that case the M orally entered into a contract to store vehicles seized by police, and the charter required all contracts other than for the ordinary needs of the city be in writing. Since it was plausible that storage of seized vehicles was in the ordinary needs of the city, it was held to not be outside the city's power to do so in an oral contract. That is applicable here because C materially and arguably complied with the charter as in Wreck-it, and did not directly contradict it as in Hiram. It should be noted that Wreck-it did not directly address the ultra vires arguments that are material in C's case, but it still could be proper persuasive authority.

It could easily be argued this was an abuse by C, however, because the C, specifically MR, assured B in June that the project was a go, long before it was actually accepted. That could be found to be an abuse of discretion. This could be the exact sort of noncompliance with formalities that the Hiram court was trying to prevent, because there was almost no compliance, besides a writing, with C's charter at that point in June. However, other issues took priority before this contract that MR stated in the meeting transcript that had good reason to be more urgently addressed. It certainly looks more like an ultra vires act in this way because it took almost 2 months for approval. That type of pre-approval assurance by MR could be deemed very inappropriate. However, MR even indicated she spoke privately with every council member closer to the date of assurance to B so this is likely going to be overcome by the ultimate approval of the project by the Council.

Result of Finding Not Ultra Vires

Since it is probable C's act was not ultra vires, the C will likely be liable under quantum meruit to B and not immune from suit. The policy behind not allowing ultra vires acts to bind a city is for the benefit of taxpayers (Hiram), even though it seems unfair to insulate a C and stick an innocent party such as B with the bill. It prevents improper actions by the city. Allowing ultra vires acts would allow the M to expand its own powers without state legislative delegation. It would allow the C to do indirectly what it could not do directly. The governmental extravagance that could happen would be placed entirely on taxpayers, and that is unfair for taxpayers to have that risk and liability. Thus, that is why a strict rule of nullity will nip those dangerous tendencies at the outset. However, since here there likely was not an ultra vires act, C could be liable for quantum meruit and is not immune.

Conclusion

It should be noted, in addition to the analysis above, there was a dissenting opinion in Hiram that provided even more support for this conclusion. The dissent in Hiram stated that the Supreme Court cases of Lyman and Galax make it clear that even when a city like C has not fully complied with formal requirements under a city charter, the C could be liable under quantum meruit. In addition, that Cs should not be unjustly enriched at the expense of an innocent P by the simple expedient failing to comply with formal requirements, as was the case here with failure to record in the council journal. In addition, the new mayor even intended to be unjustly enriched according to MR; thus, that provides an even better case.

Therefore, the C is likely not immune from a quantum meruit suit by B. First,

because C could be found to be performing a proprietary function. Second, even if C was found to be performing a governmental function, which is equally likely in this case, C can be found to not be engaging in an ultra vires act.

2. Can Blanchard Prove its Claim for Quantum Meruit?

In order to prove a quantum meruit suit, the plaintiff must establish that 1) valuable services or materials were furnished, 2) to the party sought to be charged, 3) which were accepted by the party sought to be charged and 4) under circumstances as a reasonably notified recipient of the plaintiff, in performing, expected to be paid by the recipient.

Value

Here, it is obvious that B provided valuable services or materials to C. It is similar to Lyman, where the M in that case took over the water line that produced valuable water rentals that was built by Lyman. Here, the C received the benefit of B doing all of the preparation work to get a grant for the City to upgrade its WTF. This involved review of existing facility, assessment and analysis of EPA mandates, design of upgraded WTF, permit applications and other services. Those services were of tremendous value because it gave C a chance to get a grant from the state. The value of services was said to be over $200,000 by B and, in fact, the services on the invoice indeed were of that value. B also stated this to be a fair price given the short time period for the project.

The new mayor will argue there was not value conferred because the C did not receive the grant and was notified of this on October 18th. However, it is likely still possible the C could use all of the services B provided for another application for a grant in the future, which C will likely do because its WTF needs upgrading so badly. Thus, this is a failing argument and there was value conferred.

Party

Here, the value was definitely given to C because they were the ones who wanted to upgrade the WTF for its citizens. However, it could be argued the value was conferred to the citizens of C, but this is a failing argument as well because C was charged with protecting the health and welfare of the citizens and B's services helped the C work towards that mission.

Accepted

As discussed above under the immunity section, it is very likely that the C accepted the benefit because it approved the project. It could be argued it did not accept the benefit because no action was taken after B substantially completed the work. In fact, from October until January nothing was even said to B; basically C ignored the invoice from B dated November 15. However, this situation is similar to the situation in Galax, because Galax provided repairs and renovations to the ballpark, which essentially increased income to the ballpark when the town was operating it and also increased the sale price upon the ultimate sale to a 3rd party. Here, although B is not performing the actual upgrading of the WTF in a tangible form, it is providing services that are necessary for C to be able to actually upgrade the WTF, because the C needs the funding grant from the State in order to be able to afford to upgrade the WTF (that analysis also shows value discussed above). But because C has benefited by likely avoiding having to pay for these services again in the future if it applies for a grant, it has accepted that benefit. Also, just to note, it is likely they will apply again because of necessity to avoid the fines discussed above and because it is possible, as indicated in the August 8th meeting transcript with B, that it does long-term services similar to C's needs for a lower price. Thus, because not only did C attempt to go for the grant and benefit from B's services, it likely will use what was prepared by B again in the future. This certainly amounts to acceptance.

It should be noted that if C disagreed or did not accept, it should have done so explicitly either in June before services started, or certainly in August when the Council met and B started performance and was providing updates. Because C did not, again provides proof of acceptance.

Payment Expectation

It is also clear that B expected to be paid for its services. B stated the cost to MR upfront in June. In addition, B stated the projected cost at the council meeting in August, and again it sent an invoice in November. Thus, it is clear that B expected to be paid and that C had notice of that expectation on 3 separate occasions, from before performance, during performance, and after performance. If C disagreed or did not think B was expecting payment, C should have objected on any one of those occasions within a reasonable amount of time.

It could be argued that C did object to B being expected to be paid in January, however, because of the long time delay and because it was after performance by B, this is likely a failing argument. Thus, it is most likely C knew of B's expectation of payment.

Conclusion

For the reasons above, it is very likely that if the C is not immune from quantum meruit, that B will be able to prove its claim for quantum meruit.

3. If Blanchard Were to Recover Under Quantum Meruit, How Would a Court Evaluate Damages?

In general the measure of damages in quantum meruit is the value of the benefit actually received and retained by the defendant (Galax). A plaintiff may prove

this by showing physical improvements, value of work, labor, services, and materials furnished. In addition, other points of proof may be increased sales price of property resulting from plaintiff's work or the value of risks avoided as a result of plaintiff's work.

Here, it is very likely that B will claim damages of $203,409 because that is what the invoice B provided to C on November 15, 2016 stated. It is possible B will also claim interest on this unpaid debt. C could argue that only the actual value of improvements to something tangible will be awarded because that was the case in the trial court of the Galax case. The trial court in that case awarded only $35,000 out of $61,479 because the $35,000 was for the physical improvements to the park and the remainder was for overhead costs and anticipated profits. Thus, C could argue under this reasoning that C wouldn't be liable because B did not perform any physical improvements to the WTF. However, that would likely be a failing argument. C could also argue under this theory that it would only be liable for actual physical documents provided to C, like the analysis of the old facility, analysis of EPA mandates, new design specifications, permits, and reports, but not the man-hours that were part of the cost of producing those physical documents. This is also a failing argument.

These arguments fail because the Supreme Court overturned the trial court measure of damages in Galax and included damages in accordance with the definition above. Thus, it is more likely that B will be able to recover the full $203,409 invoice price because that was the value of the work, services, and materials furnished to C. It should be noted that B could even argue for much higher damages because of the risks avoided as a result of B's work. MR noted that fines in the several-million-dollar range could result if the WTF was to become out of compliance. Thus, B could argue that by avoiding that risk of a several-million-dollar fine, B should be awarded higher damages than the invoice price, up to several million dollars. However, this is very unlikely to be awarded to B because first, the risk has not actually been avoided yet. The C is still

potentially liable for those million-dollar fines because the WTF has not been upgraded. Second, because quantum meruit is an equitable remedy to prevent unjust enrichment, if B were to be awarded damages based on speculative future risk avoided, that is not equitable and B would be getting more than B bargained for.

Conclusion

Thus, it is most likely that B will be able to recover the full contract price of $203,409 and possible interest on that amount from November through date of payment, but likely B will not be able to recover more than that.

Overall Conclusion

The biggest issue in this entire analysis is in regards to immunity. This is because if C is found to be immune because it was engaged in an ultra vires act, then C will likely not be liable to B under quantum meruit for the invoice amount. However, if C is found to not be immune, either because it was engaging in a proprietary function or because it was engaged in a governmental function but not engaged in an ultra vires act, then B will likely prevail on its quantum meruit claim and the damages will likely be the entire invoice price. Although, as noted above in the analysis, it is an extremely close call in regards to immunity, it is more probable that C would be found not to be immune than for C to be found to be immune.

PT-B: SELECTED ANSWER 2

Trammell, Simmons and Volz, PC
433 Corson Courthouse Square
Corson, Columbia

MEMORANDUM

TO: John Trammell
FROM: Applicant
DATE: February 23, 2017
RE: Claim by Blanchard Engineering, Inc. against City of Corson

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The issues evaluated in this memo include: Corson City's tenuous immunity from Blanchard's claim; the merits of the underlying claim; and how damages would be evaluated.

Corson City is likely to gain immunity against Blanchard through a determination that the agreement was an ultra vires act. This immunity is based upon an appellate level case which may be overturned if it goes to the Supreme Court. The case has stood for over a decade and has not yet been challenged. Though Blanchard is unlikely to take a case for just over two hundred thousand dollars to that level, their business is based upon municipal contracts, so they may decide that a potential win is worth the investment in litigation cost over the long term. This is a *risk* we need to be upfront to Corson City about, as this is their most meaningful method of damage avoidance in this suit. This is because, though there are some arguments to be made on the merits against Blanchard's case in chief, it would be a long-shot to win on the merits. Damages is likely the best place other than the immunity argument to stop Blanchard. This is also a long-

shot and is based upon the prevailing law having solely dealt with damages awarded for physical improvements, not intellectual services. There are sufficient parallels for Blanchard to be able to get the full measure of damages, $203,409. Noting that the new Mayor and City Council Members are fiscally conservative, the most cost-effective outcome is likely to leverage either the current state of the law or a lower court win on immunity in an out-of-court settlement.

Corson City likely has immunity under current state of the law from Blanchard's claim for quantum meruit.

In general a municipality's immunity from liability is determined by the type of function it was performing when it undertook the actions which incurred a liability. The two types of function are: governmental and proprietary. A governmental function is one where it is "directly related to the general health, safety and welfare of the citizens." *Lyman v. Town of Barnet,* (Col. Supreme Ct. 1958). A proprietary function is where the municipal corporation provides a service that other private commercial businesses also provide. *Id.* Therefore, "provided a contract is within the scope of its corporate powers, a municipality may be held liable on a contract implied in law, to prevent the municipality from enriching itself by accepting and retaining benefits without paying just compensation." *Wreck-It Co. v. City of Lossoth,* (Col. Ct. App. 2001). However, where "a municipality contracts with a total absence of power, it is not estopped from denying the resulting agreement's *validity." Hiram Grant Partnership v. City of Vanderbilt,* (Col. Ct. App. 2005). While this case has stood the intervening decade, the dissent makes clear that it may conflict with prior Supreme Court decisions. These cases, however, have not addressed the arguments of these agreements as ultra vires acts. Therefore, while current precedent states that ultra vires acts by a municipality cannot be enforced, even in equity, there is a potential that it may be overturned at the Supreme Court level.

The agreement to undertake planning and permitting for the upgrade of the wastewater treatment facility was not a governmental function. A wastewater treatment facility, while necessary for the general health and welfare of the citizens, provides a service that a commercial business can also provide. Upgrading that facility, or specifically, preparing the engineering plans and securing the government sign-offs for the upgrade, is clearly not a governmental function. The government sought out a private contractor, Blanchard, to do the work for them because this private commercial business was in the business of providing this service.

The mayor's statements about not being able to rely on a private utility were not an indication of this being a governmental function. They were instead, reminders that there was not a private utility that would be willing to pay for the work or do it for them. While this is a key component of Corson City infrastructure, water delivery is as well. In the closest parallel of type of service provided, *Lyman,* the courts determined that water delivery was not a governmental function. *Lyman v. Town of Barnet,* (Col. Supreme Ct. 1958). This is therefore, a proprietary function.

As a proprietary function, Corson City would normally have no likelihood of immunity from a lawsuit and resulting damages; however, *Hiram* offers a likelihood of immunity. Under the decision in *Hiram,* if the agreement was entered into as an ultra vires act, there is no liability based upon the agreement. *Hiram Grant Partnership v. City of Vanderbilt,* (Col. Ct. App. 2005). This includes liability under equitable theories of recovery. *Id.* A municipality's act is an ultra vires act if it is made in a manner other than that prescribed in the municipality's charter. For a contract with Corson City not to be an ultra vires act, it must be in writing, reviewed and signed by the city attorney, approved by the City Council, and entered on the council journal. *Corson City Charter* § 17-4.

The contract with Blanchard was an ultra vires act. The contract was a writing,

drafted and reviewed by the city attorney, as evidenced by the transcript and his statements. The contract was also signed by the city attorney and by Blanchard's CEO. However, the contract was never formally voted on and approved, nor was it entered on the council journal. It must be acknowledged that there is an argument that the council approved the contract by acclamation through unanimous approval prior to a vote. However, simply not objecting to a contract, as many of the council members did, does not equate to a motion of support. This avoids approval through acclamation and there was no formal vote. A lack of appropriate and actual council approval, along with the approval not being recorded in the council journal, conclusively shows that this was an ultra vires act. Therefore under *Hiram,* Corson City is not liable even for a suit under quantum meruit.

In a suit against Corson City, Blanchard will likely be unable to argue their suit on the merits due to the agreement being an ultra vires act. There is only a limited likelihood for Corson City to be able to obtain traditional immunity through this agreement being a governmental act. Even though it is likely that this will be a proprietary act, there is immunity from liability to be found in *Hiram.* This immunity is based on the agreement being an ultra vires act. The rule that has provided this limited shelter has not been tested in the highest court and there is a possibility of it being overturned. However, it does hold the best chance for Corson City to get immunity from prosecution.

Blanchard can prove the claim for quantum meruit.

To recover under the doctrine of quantum meruit, a plaintiff must prove that: "1) valuable services and/or materials were furnished, 2) to the party sought to be charged, 3) which were accepted by the party sought to be charged, and 4) under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient." *Lyman v. Town of Barnet,* (Col. Supreme Ct. 1958).

Valuable services were furnished. These services were delineated by Mr. Blanchard at the August 8 City Council meeting. The services provided were: (1) creating a design for the improvements; (2) finding and negotiating with contractors and suppliers; (3) assessment of the facility's existing capacity; (4) analysis of the relevant EPA and Columbia EPA regulatory requirements; (5) preparation of specific engineering and building designs; and (6) applications for relevant permits and permissions. These services were estimated to cost $210,000. Their billing for these services also included materials needed to complete these functions. These services were necessary preparatory work for the completion of an upgrade on the wastewater plant. Though the money for this upgrade was speculative, because there was a fiscal year limit on spending the use-it-or-lose-it grant money, the project had to be ready to implement by the time the money would potentially come in. Though the money never came, without Blanchard's services, any grant money would not have been usable. The project is one that the city will be forced to undertake within the next few years due to agency regulation. Therefore, there is much of the preparation work that can be reused when the city is forced to upgrade the water treatment facility. Therefore, Blanchard's services were not only intrinsically valuable, but specifically valuable to Corson City.

These services were furnished to Corson City. Blanchard prepared all of the documentation and plans, obtained the approvals and generally got the project ready to go. The fact that the money to fund the project did not materialize does not mean that Corson did not receive the value of the preparation work. It still received those services and has the results of Blanchard's efforts in the form of a preparation package for the upgrade of the wastewater treatment facility. Corson City received the services.

The services were accepted by the Mayor and City Council of Corson City. Though this sounds like it would require formal approval, it requires mere

acceptance. As discussed above, all of the City Council expressed some level of acceptance of the services. The Mayor and the city attorney also expressly accepted the agreement. Further, the subject of payment due if the bid for grant money were to fail was also discussed. In that discussion, at the City Council meeting of August 8th, the Mayor settled the issue of payment even if the grant money never materializes by stating that they were committed to pay Blanchard. This also received no objection. While not receiving an objection may in most cases not equate to acceptance, when on the record, having to affirmatively state that you have no objection to a proposed action, it is reasonable to construe a formal no objection to be the equivalent of an acceptance in other circumstances. This is because it is an affirmative action and denotes that you do not intend to contest an issue when it goes to formal vote. In most relevant circumstances, acceptance is the act of knowingly receiving a benefit. It is clear that their statements meet that standard and that the services were accepted by the Mayor and City Council of Corson City.

Corson City was reasonably notified that Blanchard expected to be paid by Corson City. This was first done throughout the contract and contract negotiations process. Then, at the City Council meeting of August 8, the issue of payment was discussed. Councilman Manton raised the issue of payment for the services. This payment expectation was for an estimated $210,000. Mr. Blanchard responded to the councilman that he did expect to receive the money. He considered it a good value, but he expected it to be paid. The mayor also reassured Blanchard that he would be paid. And again, when discussing the issue of payment if the grant money did not come through, as discussed above. The payment of $210,000 is not a sum that might be assumed to be waivable or minor. Therefore, through the contract and multiple discussions, Corson City was notified of Blanchard's expectation of payment.

If Blanchard is able to litigate on the merits of the quantum meruit case, it is highly likely that they will win. The only room for doubt of any size is in whether

the services were valuable. However, this doubt will likely be overcome. Likewise there is a most likely unsuccessful argument against the services being accepted. Lastly there is no doubt that services were rendered to Corson City or that they were on notice of Blanchard's expectation of payment.

The court likely would evaluate damages based on the value of the benefit received, as measured by cost to Blanchard, including profit in the amount of $203,409.

The measure of damages under quantum meruit are, in general, the value of the benefit actually received. *Galax Consultants, Inc. v. Town of Avalon Beach* (Col. Supreme Ct. 1994). This may be proved through the value of the physical improvements, increase in the sale price of the property resulting from the plaintiff's work, the value of the risks avoided through the plaintiff's design and installation of safety measures, and similar items. *Id.* These damages are to include both cost of overhead, costs and profit. *Id.*

A court, evaluating damages based upon Blanchard's successful suit on the merits, would likely award damages based upon the invoice submitted on November 15, 2016. The court, applying *Avalon,* would include all costs related to materials and time and labor, including overhead and profit. This would clearly include all costs on the invoice.

There is an argument to be made that there was no, or at least minimal, value given by Blanchard. This is because there were no physical improvements as the work was all preparatory, survey and licensing in nature. The current case law on this subject involves quantifying damages where the benefit is measurable in terms of tangible goods. The argument that there was no value would follow the direct examples of the court in that there were no actual physical improvements, the wastewater plant did not increase in sale price, and there were no new safety measures installed. However this argument will likely fail.

The benefits received from Blanchard actually fall in line with the prevailing cases. This is because a court should eliminate the physical nature that the court mentions, because the most relevant opinion is based solely on improvements, not services. Instead, looking simply at the classifications, the safety measures, design, and any increase in value are the important issues. Blanchard provided an increase in value at the time of the work by making it possible for Corson City to be able to utilize the bond money if it materialized. As discussed above, in the case on the merits, there was immense value in the grant money and it would be unusable if Corson City did not receive Blanchard's services.

Corson City's best hope at not paying Blanchard's demands are in arguing that the agreement is an ultra-vires act. This tactic may lead to a costly litigation. If it gets to the point where Blanchard is appealing a lower court decision on these grounds, it may be more cost-effective for Corson City to settle. This is because Blanchard will likely be willing to look at this case as a capital expenditure due to its business model. If the *Hiram* case were to be overturned, as it very well may be, there is little hope that Corson City would win on the merits or in damages. It is likely therefore, that the most cost-effective outcome of this case would be to leverage the current law in settlement negotiations.