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HOUSE BILL 465

**44TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION,
2000**

INTRODUCED BY

Raymond G. Sanchez

AN ACT

RELATING TO STATE EDUCATIONAL INSTITUTIONS; CHANGING
PROVISIONS RELATING TO LIABILITY RISKS OF THOSE INSTITUTIONS
TO BROADEN OPTIONS FOR COVERING THOSE RISKS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 15-7-2 NMSA 1978 (being Laws 1978,
Chapter 166, Section 7, as amended) is amended to read:

"15-7-2. RISK MANAGEMENT DIVISION.--

A. There is established a "risk management
division" of the general services department. The director
of the risk management division shall be appointed by the
secretary of general services. The director shall be
knowledgeable and experienced in general insurance practices.
The director shall be responsible for the acquisition and
administration of all insurance purchased by the state.

Except as provided by this section or by Paragraph (3) of

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1 Subsection A of Section 41-4-20 NMSA 1978, no state agency
2 may procure any kind of insurance other than through the risk
3 management division.

4 B. The risk management division shall apportion to
5 each state agency insured by the division its contributions
6 toward the purchase of insurance or for the providing of
7 coverage for any risk not insured. The amount of
8 contribution by each agency shall be determined by the risk
9 management division and shall reflect the respective risks of
10 each agency. All contributions toward the purchase of
11 insurance or for the coverage of any risk not insured shall
12 be paid into the public liability fund, the workers'
13 compensation retention fund, the public property reserve fund
14 or the group self-insurance fund, as appropriate. The
15 department of finance and administration may collect or
16 transfer funds from each agency to cover insurance or other
17 costs, pursuant to the risk management division's
18 instructions.

19 C. The director, upon a finding that efficiency
20 and economy so require, may authorize any state agency to
21 purchase insurance for, or otherwise cover, vision, dental,
22 any group or individual health, life, accidental death and
23 dismemberment or disability coverage. Any authorization
24 granted shall be conditioned upon the prior approval by the
25 director of any policy to be purchased and the premium to be
paid by the agency."

Section 2. Section 41-4-3 NMSA 1978 (being Laws 1976,

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1 Chapter 58, Section 3, as amended) is amended to read:

2 "41-4-3. DEFINITIONS.--As used in the Tort Claims Act:

3 A. "board" means the risk management advisory
4 board;

5 B. "governmental entity" means the state or any
6 local public body as defined in Subsections C, ~~[and]~~ H and I
7 of this section;

8 C. "local public body" means all political
9 subdivisions of the state and their agencies,
10 instrumentalities and institutions and all water and natural
11 gas associations organized pursuant to Chapter 3, Article 28
12 NMSA 1978;

13 D. "law enforcement officer" means any full-time
14 salaried public employee of a governmental entity whose
15 principal duties under law are to hold in custody any person
16 accused of a criminal offense, to maintain public order or to
17 make arrests for crimes, or members of the national guard
18 when called to active duty by the governor;

19 E. "maintenance" does not include:

20 (1) conduct involved in the issuance of a
21 permit, driver's license or other official authorization to
22 use the roads or highways of the state in a particular
23 manner; or

24 (2) an activity or event relating to a
25 public building or public housing project that was not
foreseeable;

F. "public employee" means any officer, employee

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1 or servant of a governmental entity, excluding independent
2 contractors except for individuals defined in Paragraphs (7),
3 (8), (10) and (14) of this subsection, or of a corporation
4 organized pursuant to the Educational Assistance Act or the
5 Mortgage Finance Authority Act and including:

- 6 (1) elected or appointed officials;
- 7 (2) law enforcement officers;
- 8 (3) persons acting on behalf or in service
9 of a governmental entity in any official capacity, whether
10 with or without compensation;
- 11 (4) licensed foster parents providing care
12 for children in the custody of the human services department,
13 corrections department or department of health, but not
14 including foster parents certified by a licensed child
15 placement agency;
- 16 (5) members of state or local selection
17 panels established pursuant to the Adult Community
18 Corrections Act;
- 19 (6) members of state or local selection
20 panels established pursuant to the Juvenile Community
21 Corrections Act;
- 22 (7) licensed medical, psychological or
23 dental arts practitioners providing services to the
24 corrections department pursuant to contract;
- 25 (8) members of the board of directors of the
New Mexico comprehensive health insurance pool;
- (9) individuals who are members of medical

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1 review boards, committees or panels established by the
2 educational retirement board or the retirement board of the
3 public employees retirement association;

4 (10) licensed medical, psychological or
5 dental arts practitioners providing services to the children,
6 youth and families department pursuant to contract;

7 (11) members of the board of directors of
8 the New Mexico educational assistance foundation;

9 (12) members of the board of directors of
10 the New Mexico student loan corporation;

11 (13) members of the New Mexico mortgage
12 finance authority; and

13 (14) volunteers, employees and board members
14 of court-appointed special advocate programs;

15 G. "scope of duties" means performing any duties
16 that a public employee is requested, required or authorized
17 to perform by the governmental entity, regardless of the time
18 and place of performance; ~~and~~

19 H. "state" or "state agency" means the state of
20 New Mexico or any of its branches, agencies, departments,
21 boards, instrumentalities or institutions; and

22 I. "state educational institution" means the state
23 institutions named in Article 12, Section 11 of the
24 constitution of New Mexico."

25 Section 3. Section 41-4-16 NMSA 1978 (being Laws 1977,
Chapter 386, Section 12) is amended to read:

"41-4-16. NOTICE OF CLAIMS.--

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A. Every person who claims damages from the state or any local public body under the Tort Claims Act shall cause to be presented for claims against a state educational institution that has elected to self-insure or purchase commercial insurance pursuant to Paragraph (3) of Subsection A of Section 41-4-20 NMSA 1978, to the president of the state educational institution, to the risk management division of the general services department for all other claims against the state, to the mayor of the municipality for claims against the municipality, to the superintendent of the school district for claims against the school district, to the county clerk of a county for claims against the county or to the administrative head of any other local public body for claims against such local public body, within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice stating the time, place and circumstances of the loss or injury.

B. No suit or action for which immunity has been waived under the Tort Claims Act shall be maintained, and no court shall have jurisdiction to consider any suit or action against the state or any local public body unless notice has been given as required by this section or unless the governmental entity had actual notice of the occurrence. The time for giving notice does not include the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.

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1 C. When a claim for which immunity has been waived
2 under the Tort Claims Act is one for wrongful death, the
3 required notice may be presented by or on behalf of the
4 personal representative of the deceased person or any person
5 claiming benefits of the proceeds of a wrongful death action
6 or the consular officer of a foreign country of which the
7 deceased was a citizen, within six months after the date of
8 the occurrence of the injury which resulted in the death; but
9 if the person for whose death the claim is made has presented
10 a notice that would have been sufficient had he lived, an
11 action for wrongful death may be brought without any
12 additional notice."

13 Section 4. Section 41-4-20 NMSA 1978 (being Laws 1978,
14 Chapter 166, Section 3, as amended) is amended to read:

15 "41-4-20. COVERAGE OF RISKS--INSURANCE.--

16 A. It [~~shall be~~] is the duty of governmental
17 entities to cover every risk for which immunity has been
18 waived under the provisions of the Tort Claims Act or any
19 liability imposed under Section 41-4-4 NMSA 1978 as follows:

20 (1) local public bodies shall cover every
21 such risk or liability as follows:

22 (a) for a risk for which immunity has
23 been waived pursuant to Sections 41-4-9, 41-4-10 and 41-4-12
24 NMSA 1978, the local public body shall cover the risk, and
25 for any commercially uninsurable risk for which public
liability fund coverage is made available, the local public
body may insure the risk in accordance with the provisions of

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1 Section 41-4-25 NMSA 1978;

2 (b) for excess liability for damages
3 arising under and subject to the substantive law of a
4 jurisdiction other than New Mexico, including but not limited
5 to other states, territories and possessions and the United
6 States [~~of America~~], the local public body shall provide
7 coverage in accordance with the provisions of Subsection B of
8 Section [~~41-4-27~~] 41-4-28 NMSA 1978, if coverage is
9 available; and

10 (c) for a risk or liability not covered
11 pursuant to Subparagraphs (a) and (b) of this paragraph, the
12 local public body shall purchase insurance, establish
13 reserves or provide a combination of insurance and reserves
14 or provide insurance in any other manner authorized by law;
15 [~~and~~]

16 (2) for state agencies except for state
17 educational institutions that have elected to obtain
18 commercial insurance or to self-insure pursuant to Paragraph
19 (3) of this subsection, the risk management division of the
20 general services department shall insure or otherwise cover
21 every such risk or liability in accordance with the
22 provisions of Section 41-4-23 NMSA 1978. Coverage shall
23 include but is not limited to coverage for all such liability
24 arising under and subject to the substantive law of a
25 jurisdiction other than New Mexico, including but not limited
to other states, territories and possessions and the United
States [~~of America~~]; and

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1 (3) a state educational institution shall
2 obtain coverage in accordance with Paragraph (2) of
3 Subsection A of this section or, in the alternative, may:
4 (a) purchase commercial insurance
5 coverage for the risks for which immunity is waived under the
6 Tort Claims Act and for risks and liability arising under and
7 subject to the substantive law of a jurisdiction other than
8 New Mexico, including but not limited to other states,
9 territories and possessions of the United States;
10 (b) self-insure some or all of the
11 risks described in Subparagraph (a) of this paragraph by
12 establishing and maintaining reserves for self-insurance
13 purposes through appropriations or contributions; or
14 (c) any combination of the methods
15 described in Subparagraphs (a) and (b) of this paragraph.

16 B. The department of finance and administration
17 shall not approve the budget of any governmental entity that
18 has not budgeted an adequate amount of money to insure or
19 otherwise cover pursuant to this section or Section 3-62-2
20 NMSA 1978 every risk of the governmental entity for which
21 immunity has been waived under the provisions of the Tort
22 Claims Act or liability imposed under Section 41-4-4 NMSA
23 1978. The ~~[public school finance division of the department~~
24 ~~of finance and administration]~~ state department of public
25 education shall not approve the budget of any school district
~~[which]~~ that has failed to budget sufficient revenues to
insure or otherwise cover pursuant to this section every risk

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1 for which immunity has been waived pursuant to the provisions
2 of the Tort Claims Act or liability imposed under Section
3 41-4-4 NMSA 1978.

4 C. No liability insurance may be purchased by any
5 governmental entity other than as authorized by the Tort
6 Claims Act."

7 Section 5. Section 41-4-23 NMSA 1978 (being Laws 1977,
8 Chapter 386, Section 17, as amended) is amended to read:

9 "41-4-23. PUBLIC LIABILITY FUND CREATED--PURPOSES.--

10 A. There is created the "public liability fund".
11 The fund and any income from the fund shall be held in trust,
12 deposited in a segregated account and invested by the general
13 services department with the prior approval of the state
14 board of finance.

15 B. Money deposited in the public liability fund
16 may be expended by the risk management division of the
17 general services department:

18 (1) to purchase tort liability insurance for
19 state agencies and their employees and for ~~[any]~~ a state
20 educational institution or local public body participating in
21 the public liability fund and ~~[its]~~ their employees;

22 (2) to contract with one or more consulting
23 or claims adjusting firms pursuant to the provisions of
24 Section 41-4-24 NMSA 1978;

25 (3) to defend, save harmless and indemnify
any state agency or employee of a state agency or a local
public body or an employee of such local public body for any

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1 claim or liability covered by a valid and current certificate
2 of coverage to the limits of such certificate of coverage;

3 (4) to pay claims and judgments covered by a
4 certificate of coverage;

5 (5) to contract with one or more attorneys
6 or law firms on a per-hour basis, or with the attorney
7 general, to defend tort liability claims against governmental
8 entities and public employees acting within the scope of
9 their duties;

10 (6) to pay ~~any~~ costs and expenses incurred
11 in carrying out the provisions of this section;

12 (7) to insure or provide certificates of
13 coverage to school bus contractors and their employees,
14 notwithstanding Subsection F of Section 41-4-3 NMSA 1978, for
15 any comparable risk for which immunity has been waived for
16 public employees pursuant to Section 41-4-5 NMSA 1978, if the
17 coverage is commercially unavailable; except that coverage
18 for exposure created by Sections 41-4-9, 41-4-10 and 41-4-12
19 NMSA 1978 shall be provided to its member public school
20 districts and participating other educational entities of the
21 public school insurance authority, by the authority, and
22 except that coverage shall be provided to a contractor and
23 his employees only through the public school insurance
24 authority or its successor, unless the district to which the
25 contractor provides services has been granted a waiver by the
authority or the authority is not offering the coverage for
the fiscal year for which the division offers its coverage.

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1 A local school district to which the division may provide
2 coverage may provide for marketing and servicing to be done
3 by licensed insurance agents who shall receive reasonable
4 compensation for their services; and

5 (8) to insure or provide certificates of
6 coverage for any ancillary coverage typically found in
7 commercially available liability policies provided to
8 governmental entities, if the coverage is commercially
9 unavailable.

10 C. No settlement of any claim covered by the
11 public liability fund in excess of five thousand dollars
12 (\$5,000) shall be made unless the settlement has first been
13 approved in writing by the director of the risk management
14 division of the general services department. This subsection
15 shall not be construed to limit the authority of an insurance
16 carrier, covering any liability under the Tort Claims Act, to
17 compromise, adjust and settle claims against governmental
18 entities or their public employees.

19 D. Claims against the public liability fund shall
20 be made in accordance with rules or regulations of the
21 director of the risk management division of the general
22 services department. If the director of the risk management
23 division has reason to believe that the fund, including any
24 transfers to the fund from the risk reserve, would be
25 exhausted by payment of all claims allowed during a
particular state fiscal year, pursuant to regulations of the
risk management division, the amounts paid to each claimant

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1 and other parties obtaining judgments shall be prorated, with
2 each party receiving an amount equal to the percentage his
3 own payment bears to the total of claims or judgments
4 outstanding and payable from the fund. Any amounts due and
5 unpaid as a result of such proration shall be paid in the
6 following fiscal years.

7 E. On or before June 15 of each fiscal year, the
8 risk management advisory board shall calculate the current
9 cash balance in the public liability fund, all revenue
10 projected to be deposited into the fund during the next
11 fiscal year and all expenditures projected to be made from
12 the fund during the next fiscal year. Within fifteen days of
13 the calculation, ninety percent of all projected excess cash
14 balances shall be transferred to the risk reserve. Excess
15 cash balances shall be calculated as the current cash balance
16 plus projected revenue minus projected expenditures."

17 Section 6. Section 41-4-26 NMSA 1978 (being Laws 1978,
18 Chapter 166, Section 18, as amended) is amended to read:

19 "41-4-26. HOME RULE MUNICIPALITY TORT CLAIMS ORDINANCES--
20 STATE EDUCATIONAL INSTITUTION RESOLUTION--SEVERABILITY--
21 APPLICABILITY.--

22 A. Any provision of an ordinance adopted by a home
23 rule municipality providing for the insurance or self-
24 insurance of tort liability risks of the home rule
25 municipality is declared to be severable if any part or
application of [~~such~~] the ordinance is held invalid.

B. [~~Any~~] A home rule municipality [~~which~~] that has

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1 adopted an ordinance providing for the insurance or self-
2 insurance of any or all of the tort liability risks of the
3 municipality shall not be eligible to participate in the
4 public liability fund created pursuant to Section 41-4-23
5 NMSA 1978.

6 C. A home rule municipality ~~[which]~~ that has
7 adopted an ordinance insuring or self-insuring its tort
8 liability risks prior to July 1, 1978 or ~~[which]~~ that has
9 adopted an ordinance after July 1, 1978 insuring or self-
10 insuring its tort liability risks pursuant to Subsection B of
11 Section 41-4-25 NMSA 1978, and a state educational
12 institution that has adopted a resolution insuring or self-
13 insuring its tort liability risks pursuant to Paragraph (3)
14 of Subsection A of Section 41-4-20 NMSA 1978, may elect to be
15 covered by the public liability fund created pursuant to
16 Section 41-4-23 NMSA 1978 for the subsequent calendar years
17 by:

18 (1) giving notice of the repeal of its
19 ordinance or resolution to the risk management division prior
20 to December 1 of any calendar year; and

21 (2) paying such assessments as may be
22 determined by the risk management division.

23 D. Occurrences giving rise to claims arising
24 during any period of time in which a home rule municipality
25 or a state educational institution had a valid or invalid
ordinance or resolution insuring or self-insuring its risks
shall be governed by the ordinance or resolution in effect at

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1 the time the claims arose and not by the public liability
2 fund created pursuant to Section 41-4-23 NMSA 1978."

3 Section 7. Section 41-4-29 NMSA 1978 (being Laws 1981,
4 Chapter 269, Section 1, as amended) is amended to read:

5 "41-4-29. GOVERNMENTAL ENTITIES--HEALTH CARE STUDENTS
6 LIABILITY COVERAGE--AUTHORITY TO PURCHASE.--

7 A. Governmental entities may purchase public
8 liability fund coverage, if offered, for health care
9 liability of health care students currently enrolled in
10 health care instructional programs provided by or through the
11 governmental entity.

12 B. The risk management division of the general
13 services department may provide public liability fund
14 coverage for health care liability of health care students
15 currently enrolled in health care instructional programs
16 provided by or through a governmental entity. Such coverage
17 shall be limited to health care liability risks arising out
18 of assigned health care instructional activities.

19 C. A state educational institution that elects to
20 purchase commercial insurance or to self-insure pursuant to
21 Paragraph (3) of Subsection A of Section 41-4-20 NMSA 1978
22 may obtain the coverage described in Subsection B of this
23 section through commercial insurance or it may self-insure.

24 [E.] D. This section shall not be construed as
25 waiving or otherwise affecting any [governmental] governmental
entity's sovereign immunity or any other limitations or
protections under the Tort Claims Act or any other law. This

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1 section shall not be construed as creating any right of
2 action against any governmental entity or any of its
3 officers, employees or servants for any activities insured
4 pursuant to this section."

5 Section 8. EFFECTIVE DATE.--The effective date of the
6 provisions of this act is July 1, 2000.

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