

**LEGISLATIVE EDUCATION STUDY COMMITTEE  
BILL ANALYSIS**

**Bill Number: \*HB 49**

**51st Legislature, 2nd Session, 2014**

**Tracking Number: .195409.2**

**Short Title: School Use of Emergency Medication**

**Sponsor(s): Representative James E. Smith**

**Analyst: Kevin Force**

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**Bill Summary:**

House Bill 49 proposes to create new sections of the *Public School Code* and *Public Health Act*, to allow for emergency administration of medication for asthma and anaphylaxis in schools.

A section-by-section synopsis of the bill follows:

**Section 1.** [Short Title.] Sections 1 through 4 of the bill, which create new sections of the *Public School Code*, are to be called the *Emergency Medications in Schools Act*.

**Section 2.** [Definitions.]

HB 49 defines a number of terms for purposes of the act, including:

- “emergency medication,” which means albuterol or epinephrine;
- “respiratory distress,” which includes impaired oxygenation of the blood or ventilation of the respiratory system; and
- “trained personnel,” which means school employees, agents or volunteers who complete epinephrine administration training documented by the school nurse, school principal or school leader and approved by the Department of Health (DOH), and who has been designated by the school principal or school leader to administer epinephrine on a voluntary basis outside the scope of employment.

**Section 3.** [Emergency medication – albuterol – epinephrine – stock supply – storage.]

- Each local school board or charter school governing body shall obtain a standing order for a stock supply of emergency medication prescribed to the school or the district by a medical practitioner employed or authorized by DOH. These medications must be stored:
  - in a secure place, that is unlocked and readily accessible to trained personnel;
  - according to Board of Pharmacy regulations; and
  - within the manufacturer-recommended temperature range.
- School boards and governing bodies shall dispose of expired medication according to Board of Pharmacy or DOH rules.

- Each local school board or governing body, or a school within its jurisdiction, may accept gifts, grants, bequests, and donations from any source to fulfill the provisions of the act, including acceptance of aerosol canisters and auto-injectors from manufacturers or wholesalers.

**Section 4.** [Local school board or governing body of a charter school – emergency medication – protocols and policies – training.]

- By August 1, 2014, all local school boards and governing bodies shall develop policies for a school nurse, or other person authorized by DOH, to administer albuterol to a student in apparent respiratory distress, even absent documentation of having asthma or a prescription for the medication. These policies shall include:
  - recognizing the symptoms of respiratory distress;
  - immediately calling for emergency medical services;
  - administration of albuterol by spacer;
  - notifying the parent or guardian of the student in distress;
  - monitoring the student and delivering additional treatment indicated until emergency services arrive.
- By August 1, 2014, all local school boards and governing bodies must:
  - develop and publish policies based on DOH rules and recommendations, as well as the protocols required by the act, and publish them on the school website; and
  - receive documentation that their trained personnel have received necessary instruction to:
    - administer epinephrine to students reasonably believed to be suffering from anaphylaxis, even absent documentation of having severe allergies or a prescription for epinephrine; and
    - follow anaphylaxis protocols to recognize the symptoms, summon emergency medical services, administer medication, notify the parent or guardian of the stricken student, monitor and continue to treat the student until the arrival of emergency services.
- Each school that receives auto-injectors must develop a plan to:
  - have at least one trained staff person on school premises during operating hours; and
  - follow an anaphylactic prevention protocol recommended by DOH to minimize an allergic student’s potential exposure to food allergens.

**Section 5.** [Emergency medication in schools – albuterol – epinephrine – rules – recommendations.]

- By July 1, 2014, DOH is to promulgate rules, and make recommendations to each school district or governing body, for the prevention and treatment of respiratory distress and sudden anaphylaxis with the administration of albuterol or epinephrine, including the maintenance, storage, and disposal of medications kept in stock supplies by the schools.

- Medical practitioners employed or authorized by the DOH may prescribe, and pharmacists may dispense, a stock supply of albuterol canisters and epinephrine auto-injectors in the name of a school or school district.
- Each school district shall maintain a stock supply of albuterol or epinephrine to fulfill the requirements of this section.
- DOH may obtain and receive gifts, grants, appropriations, and donations from any source, including the acceptance of albuterol canisters and auto-injectors.

**Section 6.** [Administration of emergency medication – epinephrine – immunity from civil liability.]

Administration, prescription, purchase, receipt, maintenance, or provision of epinephrine to a person reasonably believed to be suffering from anaphylaxis shall not result in any liability for damages, and does not constitute the practice of medicine. This immunity does not apply to gross, willful, or wanton negligence.

**Section 7.** [Appropriation.]

\$400,000 is appropriated from the General Fund to DOH for use in FY 15 to provide albuterol and epinephrine for the treatment of asthma, respiratory distress and anaphylaxis in schools. Any remaining balance reverts to the General Fund at the end of the fiscal year.

**Section 8.** [Emergency]

\*HB 49 contains an emergency clause.

**Fiscal Impact:**

HB 49 appropriates \$400,000 from the General Fund to DOH.

**Fiscal Issues:**

According to the Public Education Department (PED):

- While HB 49 appropriates \$400,000 to the DOH to offset some of the costs associated with the implementation of these provisions, that appropriation is for FY 15 only while the programmatic requirements in the bill are permanent. Districts and charters will have to rely on operational funding in other years to maintain supplies of emergency medications.
- Inclusion of disposal of expired and outdated medication in stock supplies may be costly to school districts and governing boards.
- There will be no fiscal impact to PED.

DOH indicates that the appropriation is not included in the executive budget.

The Administrative Office of the Courts (AOC) indicates that:

- there will be a minimal administrative cost for the statewide update, distribution, and documentation of statutory changes;

- any additional fiscal impact on the judiciary would be proportional to the enactment of this law and commenced civil actions claiming grossly, willfully, or wantonly negligent acts or omissions in furtherance of the *Emergency Medications in Schools Act*; and
- new laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

### **Technical Issues:**

PED notes that the bill does not define “the department” as the Department of Health, and suggests amending the bill to include an additional definition clarifying the term.

The Attorney General’s Office (AGO) notes:

- The definition of “trained personnel” includes a school nurse, school principal or school leader, but fails to define the term “school leader.”
- HB 49 does not define the terms “school district” or “governing body of a school”; because Sections 5 and 6 of HB 49 amend the *Public Health Act*, rather than the *Public School Code*, it is unclear whether private schools are included within the scope of the bill so that private schools might also be mandated to provide emergency medications to their students.
- The New Mexico Board of Pharmacy has statutory and regulatory authority to ensure proper storage of dangerous medications, so that all such storage requirements must comply with their requirements.
- The bill mandates that stock supplies of emergency medications be kept “in a secure location that is unlocked,” begging the question how a location can be both unlocked and secure.

### **Substantive Issues:**

According to PED:

- The bill requires DOH to promulgate rules for the administration of the act by July 1, 2014, which may be insufficient time to complete the rulemaking process. PED suggests extending the deadline to December 31, 2014.
- Likewise, HB 49 requires school boards and governing bodies to develop and publish policies in accordance with the requirements of the act, which may also allow insufficient time for completion.
- The *2011-2012 Annual School Health Services Report* noted the most common prescription medications provided for students at school included asthma medications, at 39 percent, and epinephrine, at 8.0 percent.
- HB 49 allows for the emergency administration of epinephrine and albuterol to students who have not been diagnosed previously with either allergies or asthma, as well as students who have been so identified.
- This legislation also provides immunity from civil liability to persons who act in good faith compliance with the provisions of the act when administering epinephrine to a student in an emergency.
- HB 49 effectively requires schools and districts to:
  - provide a school-specific location for secure storage of the medication;
  - develop policies and procedures for:

- the recognition of symptoms typical to anaphylaxis or asthmatic respiratory distress;
  - initiating an emergency medical system;
  - administering the medication; and
  - notifying parents and guardians;
- publish these policies and procedures on their websites; and
  - receive documentation that personnel had received the necessary training.
- Public schools already maintain protocol for *self*-administration of albuterol and epinephrine by students, as established in the *School Health Manual* (see, “Background,” below).

According to DOH:

- The DOH Asthma Program indicates that the prevalence of asthma among New Mexico youth, from birth to 17 years, has been increasing since 2003:
  - In 2003, about 7.5 percent of youth had asthma, which has increased to 10.4 percent as of 2011.
  - Asthma is the third leading cause of hospitalization for youths in New Mexico and the fourth leading cause of emergency room visits.
  - Approximately 43 percent of affected youths said they missed at least one day of school in the past 12 months as a result of their asthma.
- The Food Allergy Research Education (FARE) indicates that:
  - one in 13 children has a food allergy, or approximately two in every classroom;
  - acute anaphylaxis due to allergic reactions occurs in only a small number of children annually, however such occurrences are often fatal; and
  - about 25 percent of severe and potentially life-threatening anaphylaxis cases reported at schools happened in children with no previous diagnosis of food allergy.<sup>1</sup>
- A 2013 survey conducted by the New Mexico School Nurses Association showed that:
  - nearly 71 percent of school nurses in the state would have used a stock albuterol inhaler in an emergency if one had been available;
  - 28 percent would have used an epinephrine auto-injector; and
  - 71 percent of school nurses reported working in a rural area where it was common for emergency services to take up to 45 minutes to arrive at their school in response to an emergency.

Legislative Finance Committee staff note that, regarding the immunity from civil liability afforded by HB 49, it:

- extends to individuals who administer medication in the case of anaphylaxis, but not respiratory distress, potentially exposing school personnel who administer albuterol in emergency situations to liability; and

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<sup>1</sup> See, [http://www.cdc.gov/healthyouth/foodallergies/pdf/13\\_243135\\_A\\_Food\\_Allergy\\_Web\\_508.pdf](http://www.cdc.gov/healthyouth/foodallergies/pdf/13_243135_A_Food_Allergy_Web_508.pdf).

- is not limited to persons acting under the provisions of the act, but may allow any individual who prescribes, receives, purchases, maintains, or administers emergency anaphylaxis medication to claim immunity.

According to the Medical Board:

- HB 49 fails to specify the importance of advance planning in the provision of relevant medical history, including:
  - the patient’s prior treatment of respiratory distress or anaphylaxis due to allergy;
  - advance informed consent; and
  - a relevant medical history from the parent, guardian, or legal custodian.
- While HB 49 states that treatment with epinephrine “does not constitute the practice of medicine,” when, in fact, it is the practice of medicine, requiring appropriate training to provide. (It is, however, within the scope of practice of an appropriately trained school nurse or an appropriately trained surrogate authorized by the school nurse or the DOH.)
- The provisions of the bill should be implicated only by emergency situations, and emergency medical services should always be summoned.
- Immunity from civil liability should only lie with the provision of health services as described in the bill.

According to the Board of Nursing:

- The Board of Nursing, the *Nurse Practice Act*<sup>2</sup>, and pertinent rules and regulations restrict nursing diagnoses and assessments, as well as the administration of medication, to a person licensed or certified by the Board of Nursing, so that, currently, only a licensed school nurse would be authorized to perform these functions.
- Exceptions to the *Nurse Practice Act* include: “nursing assistance in case of emergencies,” which might be applicable to the situations described in this bill.

According to the Regulation and Licensing Department (RLD):

- While the provisions of the bill would authorize pharmacies and wholesale drug distributors to provide prescription drugs to schools, pharmacies and wholesalers will not sell to such unlicensed entities.
- The medical and nursing boards would have to modify their unprofessional conduct rules to allow for standing orders for medications in schools.<sup>3</sup>
- Current law requires a proper license in order to acquire and possess prescription drugs.<sup>4</sup>
- This bill would authorize unlicensed individuals to administer prescription drugs to children without requiring consent from parents.

According to the AGO:

- The *New Mexico Drug, Device and Cosmetic Act*<sup>5</sup> may have provisions that preclude or complicate the emergency medications program under HB 49:

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<sup>2</sup> Chapter 61, Article 3 NMSA 1978

<sup>3</sup> See 16.10.8.8(L) NMAC.

<sup>4</sup> See 26-1-16 NMSA 1978.

- New Mexico-licensed practitioners may prescribe, provide samples of, and dispense any dangerous drug to a patient where there is a valid practitioner-patient relationship<sup>6</sup>, which is defined as a professional relationship (as defined by the appropriate licensing board) between the practitioner and the patient.<sup>7</sup>
  - It is unlawful for a person to sell, possess, or dispose of any dangerous drugs except for distributors, wholesalers, hospitals, nursing homes, clinics, pharmacies, and other dealers licensed by the New Mexico Board of Pharmacy. Schools are not included in these exceptions, thus requiring them to be licensed in order to distribute these medications.<sup>8</sup>
  - It is illegal to possess any dangerous medication without a prescription.<sup>9</sup>
- For authorized prescribers, the provisions of HB 49 that allow for a stock supply of albuterol and epinephrine pursuant to “a standing order prescribed in the name of the school or school district” would require amendments to the statutes or rules defining unprofessional or dishonorable conduct of professional healthcare licensing boards whose licensees have prescriptive authority. For example, the Medical Board rules define “unprofessional or dishonorable conduct” as “prescribing, dispensing or administering drugs or medical supplies to a patient when there is *no established physician-patient relationship*.”<sup>10</sup> (Emphasis in original.)
  - If it is determined that schools require licenses in order to receive and maintain stock supplies of emergency medications, a portion of the appropriation for the provisions of this bill could be earmarked for licensing fees.

According to the AOC, the requirement to immediately notify emergency services may help insulate districts, governing bodies, schools, and school personnel from claims of civil liability alleging gross, willful, or wanton negligence in the administration of emergency medications.

### **Background:**

The *New Mexico School Health Manual* was developed to provide recommendations and guidelines to school nurses and other school health personnel for coordinated school health practices and programs throughout New Mexico.<sup>11</sup> The *Manual* indicates that all medications should be administered by a PED-licensed school nurse, although they may delegate this authority to qualified unlicensed persons. Current law in New Mexico is largely silent on the issue, although several pertinent statutes do exist:

- **Section 22-5-4.3 NMSA, School discipline policies; students may self-administer certain medications**, which allows for the *self*-administration, by students, of medicines to counter the effects of asthma and anaphylaxis, under certain conditions<sup>12</sup>;
- **Section 24-10-1 NMSA, Emancipated minors; hospital, medical and surgical care**, which addresses the specific issue of consent to medical care of emancipated or legally married minors; and

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<sup>5</sup> Chapter 26, Article 1, NMSA 1978

<sup>6</sup> See 26-1-16(B) NMSA 1978.

<sup>7</sup> See 26-1-2(Z) NMSA 1978

<sup>8</sup> See 26-1-16(A)(2) NMSA 1978.

<sup>9</sup> See 26-1-16(E) NMSA 1978.

<sup>10</sup> See 16.10.8.8(L) NMAC.

<sup>11</sup> See, <http://www.nmschoolhealthmanual.org/>.

<sup>12</sup> See also 6.12.2.9 NMAC, Student’s Right to Self-Administer Certain Medications.

- **Section 24-10-2 NMSA, Consent for emergency attention by person *in loco parentis*,** which, notwithstanding any other provision in law, allows for a person standing *in loco parentis* to a minor to consent to emergency medical attention when the minor’s parents cannot be located after reasonable efforts, under the circumstances, have been made to find them.

According to the *Manual*:

“For medication administration to take place during school hours, each local education agency should adopt a written policy to meet local needs regarding both prescription and non-prescription drugs. The State of New Mexico *Nursing Practice Act Rules*<sup>13</sup> should be followed . . . To ensure that students are medicated at school under maximum protection, the following guidelines should be followed:

- An authorization to administer prescription medication, signed and updated annually by both the student’s primary healthcare provider and parent/guardian should be on file at the school.
- This authorization form should be approved by the local School Board.
- Authorization forms apply to both prescription and non-prescription medications.
- The signed medication authorization form should be reviewed and approved by the PED-licensed school nurse in the school district.
- A parent/guardian should provide the school with a pharmacy-labeled container or original manufacturer’s/provider’s container that holds the appropriate medication to be administered in the school setting.
- Unused medication should be disposed of or returned according to written District School Board policy.”<sup>14</sup>

Further, concerning emergency medications:

“School districts are encouraged to have written policies and procedures regarding the administration of emergency medications in the school setting as part of the routine medication policies and procedures, as well as in the school district’s emergency plan.

While schools are not expected to function as emergency care centers, there are students at high risk for life-threatening situations and for whom access to prescribed emergency medications may be life-saving. Policies and procedures for providing emergency care in the school setting in the absence of a licensed school nurse should be included in the school emergency plan.”<sup>15</sup>

Some guidelines for consideration of school district policies and plans include:<sup>16</sup>

- consideration of the most common emergency medications, such as those for anaphylaxis, asthma and diabetes, like epinephrine, albuterol, glucagon, seizure medications, oxygen,

<sup>13</sup> The New Mexico *Nursing Practice Act* is Chapter 61, Article 3 NMSA; the accompanying rules are at 16.12.2 NMAC.

<sup>14</sup> New Mexico School Health Manual, Section VI, p. 3.

<sup>15</sup> *Id.*, p. 8.

<sup>16</sup> *Id.*, p. 9.



and insulin, for which a student's healthcare provider should write orders, providing clear guidance regarding the circumstances and manner under which the medications should be administered;

- identification of unlicensed personnel trained to assist with such medications in the absence of a school nurse;
- recommended responses to emergency situations, including, where appropriate, recourse to 911 emergency services;
- inclusion of acceptable and safe emergency intervention procedures and parameters, including consideration of *loco parentis* designation, in student Individualized Health Plans (IHPs), which require signatures of both parents and responsible school staff; and
- potential legalities involved in *not* responding with available emergency medication, as well as the potentially complicated legal and ethical issues attendant upon keeping such medications on school premises, particularly liability that may lie when a person chooses to act or not to act in these sorts of circumstances.

According to the 2011 *New Mexico Youth Risk and Resiliency Survey* (YRRS):<sup>17</sup>

- 11.8 percent of high school students in New Mexico report having asthma, with:
  - 13.1 percent of female students reporting the condition; and
  - 10.6 percent of male students reporting;
- 10.1 percent of New Mexican middle school students reported asthma; and
- there was no statistically significant difference between:
  - rates of asthma among middle school students now and those reported in the 2009 survey;
  - boys and girls;
  - different grade levels;
  - different ethnicities; or
  - school performance.

DOH notes that:

- HB 49 follows national legislation passed this fall<sup>18</sup>, which acknowledged the importance of school personnel's ability to administer epinephrine in emergency situations;
- states that have this emergency epinephrine consideration in place qualify for additional preference for asthma-related federal grants;
- HB 49 builds on the national legislation by including albuterol for use with students with asthma related symptoms or respiratory distress; and
- The New Mexico Council on Asthma, was directly involved in the development of HB 49, and proposes a voluntary approach to ensure timely enactment of the provisions.

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<sup>17</sup> The YRRS is a biannual survey of New Mexican high school and middle students conducted in odd-numbered years, as part of the national CDC Youth Risk Behavior Surveillance System. The results of each survey are generally available and published in the summer or fall of the year following the survey, and cover a range of topics, including general health, alcohol and drug use, violence, suicide, bullying, nutrition, etc.

See: <http://www.youthrisk.org/>.

<sup>18</sup> Public Law 113-48, 113<sup>th</sup> Congress

**Committee Referrals:**

HRC

**Related Bills:**

HB 52 *School Administration of Emergency Medications* (Identical to SB 75)

HB 53 *Students Carrying Emergency Medication*

SB 75 *Emergency Medications in Schools* (Identical to HB 52)