

LFC Requester:	Jonas Armstrong
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**AGENCY BILL ANALYSIS
2014 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

And

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date January 10, 2014

Bill No: HB49-305 Jan 10

Sponsor: Rep. James E. Smith

Reviewing Attorney General's Office

Short School Use of Emergency

Person Writing Mary H. Smith

Title: Medications

Phone: 222 9093 **Email** msmith@nmag.gov

SECTION II: FISCAL IMPACT **FOR LFC OFFICIAL PURPOSES****
AGO STAFF SHOULD LEAVE SHADED AREAS BLANK**

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY14	FY15		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

Duplicates/Relates to Appropriation in the General Appropriation Act:

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY14	FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to:

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion Letter. This is a staff analysis in response to the agency’s committee’s or legislator’s request.

BILL SUMMARY

Summary Synopsis: HB 49 enacts a new “Emergency Medication in Schools Act” within the Public School Code and amends the Public Health Act so as to mandate a public school to obtain, store and administer (1) albuterol to students in apparent respiratory distress and (2) epinephrine to students having an anaphylactic reaction.

HB 49 includes provisions for a school’s (1) disposal of expired emergency medications; (2) development of policies, procedures, protocols and recommendations for an emergency medications program; and (3) acceptance of gifts, grants, bequests and donations to carry out the emergency medications program. Section 5(A) and (B) mandate the NM Department of Health to promulgate rules for the emergency medications in schools program by July 1, 2014.

HB 49 provides a \$400,000.00 appropriation to the NM Department of Health for expenditure in FY 2015.

HB 49 contains an emergency clause.

FISCAL IMPLICATIONS WITH ENACTING THIS BILL

None for the AGO.

SIGNIFICANT LEGAL ISSUES

1. The New Mexico Drug, Device and Cosmetic Act may have provisions that may preclude or complicate the emergency medications in schools program anticipated by HB 49:

a. NMSA 1978, § 26-1-16(B) allows NM-licensed practitioners to “prescribe, provide samples of and dispense any dangerous [prescription] drug to a patient where there is a valid practitioner-patient relationship.” A “valid practitioner-patient relationship” is defined in § 26-1-2(Z): “a professional relationship, as defined by the practitioner’s licensing board, between the practitioner and the patient.”

b. § 26-1-16(A)(2) makes it unlawful for a person to sell, dispose of or possess any dangerous drug except for “distributors, wholesalers, hospitals, nursing homes, clinics or pharmacies and other authorized” New Mexico retailers of dangerous drugs licensed by the New Mexico Board of Pharmacy. A school is not included in this list of exempted entities, and thus would require licensure by the New Mexico Board of Pharmacy in order to possess and dispense

any dangerous drugs.

c. § 26-1-16(E) makes it unlawful for a person to possess any dangerous drug without a valid prescription.

2. HB 49 contains no requirement that parental consent be obtained before any student is administered emergency albuterol or epinephrine at school.

3. Sections 3(D) and 5(F) authorize a school board, charter school governing body or the Department of Health to accept, obtain or receive gifts of albuterol and epinephrine from “a manufacturer or wholesaler” of such medication. However, Board of Pharmacy rules prohibit “a licensed wholesale drug distributor” from distributing dangerous drugs to persons who are not licensed to possess these drugs. 16.19.8.13(I)(3) NMAC. As a practical matter, neither pharmacies nor manufacturers will sell dangerous drugs to unlicensed persons.

4. Section 6 provides immunity from civil liability for the “prescription, purchase, receipt, maintenance, provision or administration of *epinephrine*,” but no such immunity from civil liability is provided for the “prescription, purchase, receipt, maintenance, provision or administration of *albuterol*.”

5. For authorized prescribers, HB 49’s provisions (Sections 3(A) and (B) and 5) allowing 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 health care 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*.” 16.10.8.8(L) NMAC.

PERFORMANCE IMPLICATIONS WITH ENACTING THIS BILL

None for the AGO.

ADMINISTRATIVE IMPLICATIONS WITH ENACTING THIS BILL

None for the AGO.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP WITH BILLS INTRODUCED THIS SESSION

HB 49 is nearly identical to HB 52; the primary substantive differences are that HB 49 includes a \$400,000 appropriation to the NM Department of Health and contains an emergency clause.

TECHNICAL ISSUES OR DRAFTING ERRORS

1. Section 2(K) defines “trained personnel” to include a school nurse, school principal or school leader” but the term “school leader” is not defined.

2. HB 49 does not define the terms “school district” or “governing body of a school.” Sections 5 and 6 amend the Public Health Act (as opposed to Sections 1-4 amending the Public School

Code), so it is unclear as to whether private schools are included within the scope of the Public Health Act such that private schools might be mandated to provide emergency medications to their students. While the state constitution's anti-donation clause (art. IX, § 14) would exclude private schools from obtaining any benefit from the state without fair consideration in exchange, Sections 5 and 6 are not clear as to whether they apply to both public and private schools.

3. The New Mexico Board of Pharmacy has statutory and regulatory authority to ensure the proper storage of dangerous drugs, and all the storage requirements set forth in Section 3(A) and (B) — including keeping dangerous drugs in a secure location and within manufacturer-recommended temperate range — must be in accordance with Board rules.

4. Sections 3(A)(1) and 5(B)(4) mandate that stock supplies of albuterol aerosol canisters and spacers, and epinephrine auto-injectors be kept “in a secure location that is unlocked.” How can an unlocked location also be “secure”?

OTHER SUBSTANTIVE LEGAL ISSUES

If it is determined that these schools must be licensed by the Board of Pharmacy in order to allow the dangerous drugs albuterol and epinephrine to be kept and administered in schools as part of the emergency medications in schools program, a portion of the \$400,000.00 appropriation could be earmarked for license fees.

ALTERNATIVES TO ENACTING THIS BILL

The Board of Pharmacy could work with the Department of Health, Medical Board, Board of Nursing and schools to provide for licensing by the Board of Pharmacy that would specifically permit schools to establish an emergency medications in schools program.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo; students having an anaphylactic reaction or in respiratory distress at school who do not otherwise have medications on their persons will have to wait for emergency responders to provide treatment.

AMENDMENTS NEEDED TO IMPROVE THIS BILL

See Significant Legal Issues, Technical Issues or Drafting Errors, Other Substantive Legal Issues.