

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 369 Student Safety

**SPONSOR(S):** Local and Federal Affairs Committee, La Rosa and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 284

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Choice & Innovation Subcommittee	13 Y, 0 N	Ammel	Fudge
2) Local & Federal Affairs Committee	14 Y, 0 N, As CS	Baker	Rojas
3) Judiciary Committee	17 Y, 0 N	Arguelles	Havlicak
4) Education Committee	18 Y, 0 N	Ammel	Mizereck

### SUMMARY ANALYSIS

The bill requires the agency responsible for notifying a school district for each type of emergency to be listed in a district school board's emergency response policy and in its model emergency management and preparedness procedures. The bill also authorizes private schools to opt into the district school board's emergency notification procedures and be notified by the relevant emergency response agencies.

Although current Florida law requires each district school board to establish policies and procedures for emergencies, the law does not require that district school board policies and procedures list the agencies responsible for notifying the school district in case of an emergency.

Currently, students with proper authorization may carry epinephrine auto-injectors, also known as "epi-pens," at school activities for allergic reactions. The bill gives an option to public and private schools to purchase and store the same devices on campus. A school that stores the auto-injector must adopt a protocol for administering the device. The bill provides that except for willful and wanton conduct, trained school employees and the physicians who develop the school's protocol on administering the auto-injectors are protected from liability arising from administering the auto-injector.

The emergency policies of private schools are not regulated by the state. Private schools typically make arrangements to receive notification of emergencies from the appropriate emergency response agency. Florida law does not expressly authorize private schools to opt into school district emergency notification procedures for the purpose of receiving emergency notifications.

The bill has no fiscal impact on state or local governments.

The bill takes effect July 1, 2013.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### Emergency notification procedures

Florida law does not expressly require that school district emergency response policies and model emergency management and preparedness procedures list the agencies responsible for notifying the school district regarding emergencies. However, cooperation with emergency response agencies is incorporated into the *Safety and Security Best Practices*, a self-assessment tool that each school district must use to annually assess the effectiveness of district emergency response policies. Among other “best practices,” the self-assessment suggests that school districts:

- Make arrangements to work with local emergency officials, including, without limitation, law enforcement; fire department; emergency management; hospital, mental health, health, and social services agencies; and court officials.
- Share comprehensive school safety plans and emergency procedures with appropriate emergency response agencies.
- Implement procedures for contacting all district schools simultaneously regarding an emergency.<sup>1</sup>

Florida law requires each district school board to establish emergency response policies and model emergency management and preparedness procedures. Emergency response policies must include procedures for responding to fires, natural disasters, and bomb threats. Commonly used alarm system responses for specific types of emergencies must be incorporated into such policies.<sup>2</sup> Additionally, district school boards must establish model emergency management and preparedness procedures for weapon-use and hostage situations; hazardous materials or toxic chemical spills; weather emergencies, including hurricanes, tornadoes, and severe storms; and exposure resulting from manmade emergencies.<sup>3</sup>

Private school emergency policies are not regulated by the state.<sup>4</sup> Private schools typically make arrangements to receive notification of emergencies from the appropriate emergency response agency. Despite such arrangements, private schools do not always receive notification.<sup>5</sup> Florida law does not expressly authorize private schools to opt into district school board emergency notification procedures for the purpose of receiving notification of emergencies from an emergency response agency.<sup>6</sup>

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<sup>1</sup> Section 1006.07(6), F.S.; Florida Department of Education, *District Safety and Security Best Practices*, <http://www.fldoe.org/EM/security-practices.asp> (last visited April 1, 2013). The Best Practices are developed by the Office of Program Policy Analysis and Government Accountability. Section 1006.07(6), F.S. Each district school superintendent must make recommendations to the school board for improving safety and security based upon the self-assessment results. The self-assessment results and superintendent’s recommendations must be addressed in a publicly noticed school board meeting. The results of the self-assessment and any school board action on the superintendent’s recommendations must be reported to the Commissioner of Education within 30 days after the school board meeting.

<sup>2</sup> Section 1006.07(4)(a), F.S.

<sup>3</sup> Section 1006.07(4)(b), F.S.

<sup>4</sup> Telephone interview with Bureau Chief, Emergency Management, Florida Department of Education (Mar. 17, 2011), confirmed by Bureau Chief, Emergency Management, Florida Department of Education (Mar. 15, 2013).

<sup>5</sup> Telephone interview with Executive Director, Florida Council of Independent Schools (Mar. 11, 2011), confirmed by Executive Director, Florida Council of Independent Schools (Mar. 21, 2013).

<sup>6</sup> See s. 1002.42, F.S.

## Allergic Reactions

The law currently permits a student with parental or physician authorization to carry an epinephrine auto-injector at school activities for allergic reactions. As regards to any liability arising from the student's own use of an auto-injector, the parent of such a student must indemnify the school district and its employees of such liability.

## Liability

### *Public school personnel*

Currently, there is no civil liability for public school personnel who administer medication unless the person administering the medication acts negligently.<sup>7</sup>

### *Private persons*

There does not appear to be any law specifically addressing the liability of private school personnel who administer medicine. However, Florida law does contain the Insect Sting Emergency Treatment Act, which applies to school teachers who have responsibility for a person with severe reactions to insect stings.<sup>8</sup> That law establishes a certification scheme for administering epinephrine auto-injectors.<sup>9</sup> That scheme merely authorizes a person to administer an auto-injector and does not address liability for improper administration.

For private persons, Florida's Good Samaritan Act may apply.<sup>10</sup> However, that act still permits liability when an individual renders aid in a negligent fashion.<sup>11</sup> In addition, the actual protection of that act likely does not apply to private school personnel since only licensed hospitals, employees of such hospitals working in a clinic inside the hospital facility, and emergency room physicians are protected by the act.<sup>12</sup>

Thus, it seems the general rules of negligence and civil liability would apply to private school personnel who cause harm to a student by improper administration of an auto-injector.

## **Effect of Proposed Changes**

### Emergency notification procedures

The bill requires the agency responsible for notifying a school district for each type of emergency to be listed in each district school board's emergency response policy and in its model emergency management and preparedness procedures.

The bill provides that if a private school requests such notification by opting into the district school board's emergency notification procedures, then the emergency response agencies listed must notify a private school in the school district of occurrences that threaten student safety. This will enable a private school to receive emergency notifications in the same manner as district public schools.

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<sup>7</sup> Section 1006.062(2), F.S.

<sup>8</sup> Section 381.88, F.S.

<sup>9</sup> *Id.*

<sup>10</sup> Section 768.13, F.S.

<sup>11</sup> Section 768.13(2)(a), F.S.

<sup>12</sup> See *Jackson County Hosp. Corp. v. Aldrich*, 835 So.2d 318 (2002).

## Allergic Reactions

The bill gives an option to private and public schools to purchase and store epinephrine auto-injectors, also known as “epi-pens,” on campus. The bill requires schools that possess such auto-injectors to adopt a protocol developed by a licensed physician for the purpose of training school personnel to administer the device in the event of an allergic reaction. According to the bill, students who are authorized to self-administer may use the school’s auto-injectors.

## Liability

The bill protects public and private school employees from liability for harm caused by their use of the auto-injector unless the employee acted in a willful and wanton manner. The same liability protection applies to physicians who develop the school’s protocol on administering the auto-injectors.

The bill further provides that liability does not exist for school employees despite:

- 1) the fact the parents of the affected student did not receive notice or sign an indemnity; and
- 2) the fact the student’s parents, physician, physician’s assistant, or advanced nurse practitioner have not authorized the administration of an epinephrine auto-injector on the student.

The bill effectively increases the protection for school employees who administer an auto-injector. Whereas, a plaintiff suing public school personnel under the current law must only prove negligence, this bill would increase the required proof to willful and wanton conduct.

For suits against private school personnel, the bill would increase the legal protection by increasing the necessary standard of proof for liability. Instead of mere negligence, the bill would require that a plaintiff prove willful and wanton conduct. Wantonness is a standard of proof used for the more extreme remedy of punitive damages.<sup>13</sup>

## B. SECTION DIRECTORY:

Section 1: Amends s. 1006.07, F.S., relating to district school board duties regarding student discipline and school safety; requires school boards to identify in emergency policies and procedures the agency responsible for notifying the school district regarding emergencies.

Section 2: Amends s. 1002.20, F.S., relating to public schools; expressly permits public schools to store epinephrine auto-injectors on campus; requires schools to adopt a protocol developed by a licensed physician; removes school employees’ liability arising from administration of an auto-injector unless done in a willful or wanton manner; removes same liability from physician who developed the protocol.

Section 3: Amends s. 1002.42, F.S., relating to private schools; requires an emergency response agency to notify private schools of emergencies that threaten student safety; authorizes private schools to request such notification by opting into school board notification procedures; expressly permits private schools to store epinephrine auto-injectors on campus; requires schools to adopt protocol developed by a licensed physician; removes school employees’ liability arising from administration of an auto-injector unless done in a willful or wanton manner; removes same liability from physician who developed the protocol.

Section 4: Provides an effective date of July 1, 2013.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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<sup>13</sup> See *Penzer v. Transportation Ins. Co.*, 29 So. 3d 100 (Fla. 2010). Other terms that are associated with the standard of proving punitive damages in Florida are willfulness, malice, moral turpitude, outrageous aggravation, or reckless indifference.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have a fiscal impact on the state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

Indeterminate fiscal impact. The cost of purchase and storage of auto-injectors as well as adopting physician-developed protocols is difficult to determine since the bill merely authorizes, rather than requires, private and public schools to carry their own supply of auto-injectors.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."<sup>14</sup> In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the people of Florida and, if so, that it has not provided a reasonable alternative for redress and that there is not an "overpowering public necessity" for eliminating the right.<sup>15</sup>

This right could be implicated if a court were to find that the bill abolishes a right of access to the courts that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.<sup>16</sup> The bill may implicate concerns relating to the constitutional right of access to courts to the extent that the bill limits causes of actions against public and private school employees and physicians who developed the school's protocol on administering the auto-injectors.

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<sup>14</sup> Fla. Jur. 2d., s. 360.

<sup>15</sup> Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).

<sup>16</sup> The enactment of the Declaration of Rights of the Florida Constitution was part of Florida's new constitution of 1968 and occurred when it was ratified by the electorate on November 5, 1968.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

It is unclear whether the bill would conflict with Florida law regarding restrictions on certain parties to drug distribution chains. Namely, the bill does not address whether a school that purchases auto-injectors is prohibited from distributing them to other parties.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 22, 2013, the Local and Federal Affairs Committee adopted one amendment. That amendment allowed public and private schools to purchase and store epinephrine auto-injectors, also known as “epi-pens,” on campus to address allergic reactions. The amendment required that a school that chooses to store such auto-injectors must also develop a protocol for their use by trained school personnel. The amendment removed any liability for trained school personnel who administer the auto-injector to a student with certain exceptions. This analysis is drafted to the committee substitute as passed by the Local and Federal Affairs Committee.