



# Legal Issues Bulletin

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## Legal issues concerning the administration of prescribed medications, health care procedures and medical emergencies in schools and TAFE NSW

The advice in this bulletin applies where it is necessary for school students to take prescribed medication, to undergo health care procedures or to receive emergency assistance at school or during a school activity outside of school.

The bulletin should be read in conjunction with:

- the relevant Departmental policy - *Student Health in NSW Public Schools – A Summary and Consolidation of Policy*
- *Legal Issues Bulletin No. 52 – Legal rights and responsibilities to a government school student who is diagnosed as being at risk of anaphylaxis*
- *Safety Alerts 35 and 40* (Intranet only)
- the *student health website* which provides specific advice about a range of health care related issues.

Though the same legal principles apply in relation to TAFE students, it is acknowledged in practice there will be very few TAFE students who require assistance with the administration of prescribed medications and health care procedures.

### What is the relevant law?

There are five main areas of relevant law:

- Discrimination legislation
- Occupational health and safety legislation
- Privacy legislation
- Common law duty of care and
- Civil liability legislation

### Which discrimination legislation is applicable?

The Commonwealth *Disability Discrimination Act 1992* and the NSW *Anti-Discrimination Act 1977* ("the disability legislation") both provide that discrimination on the grounds of disability is unlawful. The definition of "disability" is very wide. Any student who has to take prescribed medication, or needs health care procedures administered, either on an ongoing or emergency basis, has a "disability" under these laws.

## When does the disability legislation apply?

The Department's obligations under the disability legislation apply both at the time of enrolment and while ever the student attends school. This means that students who require the administration of prescribed medication or the provision of a health care procedure should not be:

- refused enrolment, or
- denied the opportunity to continue with their education once enrolled (unless they would be treated the same way if they did not require the medication or procedure).

## Can enrolment be refused or delayed on the basis of the need to administer prescribed medications and/or health care procedures?

If the enrolment or continued attendance at school gives rise to genuine safety issues that cannot be resolved or imposes an unjustifiable hardship it may be necessary to consider refusing the enrolment application or determining an appropriate alternate educational setting.

The need to consider such action on the basis of the need to administer prescribed medication or a health care procedure will be rare. If this situation arises, the principal must contact the School Education Director prior to making any final decision. At all times, the primary focus should be the identification and provision of appropriate support measures for the student.

If there is uncertainty about whether safety issues preclude enrolment or whether unjustifiable hardship applies, Legal Services Directorate staff should be consulted.

Refusing enrolment or continued access to education because of the need to administer prescribed medication or a health care procedure, other than in circumstances where there are unresolvable safety issues or an unjustifiable hardship arises, will amount to unlawful discrimination.

Generally it is important to put measures in place to address student health care needs in time for a student's commencement of classes. Sometimes it may not be possible to implement necessary health care support arrangements in time for commencement. If commencement in these circumstances would put the student's safety at risk, it should be deferred, but only for the minimum time needed to introduce the necessary arrangements. Consideration may also need to be given to alternate educational programs in the interim period.

## How does work health and safety legislation apply?

The *Work Health and Safety Act 2011* ("the WH&S Act") obliges the Department to do everything reasonably practicable to ensure that staff and students are not exposed to risks to their health and safety at school. The WH&S Act provides that an employee must, while at work, take reasonable care for the health and safety of people who are at the employee's place of work and who may be affected by the employee's acts or omissions at work.

## What is the practical implication of the obligations arising under the WH&S legislation?

As a minimum this means that any school staff member must, if necessary, reasonably assist in an emergency. An emergency can be described as a situation where, if assistance is not rendered immediately, the student could suffer serious illness, injury or death. An individual health care plan must be developed for any student diagnosed as being at risk of a medical emergency at school (see *Student Health in NSW Public Schools – A Summary and Consolidation of Policy*). Such a plan will incorporate an emergency response/care plan.

It is essential that all staff who could be called upon to administer medication or health care procedures in an emergency are appropriately trained by a suitably qualified person. It is also important that medication and health care procedures are administered in accordance with parents' instructions and consistent with medical advice. If parents' instructions are inconsistent with medical advice, the medical advice is to be followed.

It is possible that an undiagnosed student may have an unforeseen medical emergency at school. In the absence of a health care plan staff must provide what assistance they can within the limits of their skills and training and request emergency medical assistance.

## Is it enough to rely on volunteers to assist if an emergency arises?

No. The obligations of the Department and staff under the WH&S legislation mean that any school staff member must, if necessary, reasonably assist in an emergency.

## Can staff be compelled to administer medication or health care procedures to students in non-emergency situations?

No. The routine (non-emergency) administration of prescribed medication and health care procedures by staff is performed on a voluntary basis. Where it is necessary for such tasks to be performed at school, where no staff are prepared to perform such tasks and where community resources cannot assist, the school must seek the advice of Regional Office staff. If necessary, further assistance and advice can be obtained from relevant Disability Programs or Student Welfare staff at State Office.

Refer to the [Joint Statement on Role Boundaries in the Provision of Support at School for Students Requiring Health Care Procedures – 2005](#) (Intranet only) which was developed to assist schools to identify those activities in relation to health care procedures which are the responsibility of the school.

An enrolment application cannot be refused solely on the ground that no staff member is willing to assist.

Staff affected should be consulted in the development of individual health care plans and in any case where their assistance in administration of prescribed medication or health care procedures is likely to occur. It is particularly important that they be consulted with respect to students with emergency care needs.

School administrative and support staff may be eligible for the payment of an allowance in respect of the administration of prescribed medications and in respect of the carrying out of health care procedures - refer to the Department's [Human Resources Directorate](#) (Intranet only) website.

## What privacy issues arise?

The [Privacy and Personal Information Protection Act 1998](#) and the [Health Records and Information Privacy Act 2002](#) ("the Privacy Legislation") place limitations on the collection, use and disclosure of personal information. In order to ensure a student's health and safety, it may be necessary to provide medical and other information to members of staff. Depending on the circumstances, it may sometimes be necessary to convey such information to other parents and students. There is no breach of the Privacy Legislation in such circumstances.

Where it is necessary to provide information to staff, other parents or students, the parent or caregiver and/or the student (where appropriate) with the health care need must be informed of this beforehand. Principals should ensure that persons who are provided with personal information about another person are aware of the need to deal with such information sensitively and confidentially.

## What is the Department's common law duty of care?

The Department has a common law duty of care to take reasonable steps to keep students safe while they attend school. This includes the administration of prescribed medication and/or health care procedures while they attend school. In cases where a student is identified as being able to self-administer prescribed medication or a health care procedure, the Department has a duty to take reasonable steps to ensure that the self administration is carried out safely (both to the student concerned, and to other students).

## How does civil liability legislation impact on the Department's obligations?

The [Civil Liability Act 2002](#) requires the Department to take precautions to prevent risk of harm to students where the risk is foreseeable, significant and, having regard to the circumstances, a reasonable person in the Department's position would have taken those precautions. It supplements obligations under the common law duty of care.

## What is the role of parents?

Parents are required to indicate at enrolment if their child has any health care needs. Parents also have a responsibility to:

- ensure a sufficient supply of up to date medication and any 'consumables' necessary for its administration are available
- provide the school with any up to date medical information from treating doctors or other relevant health care practitioners
- inform the school of any changes to the health care needs of their children as those changes occur.

Generally it is desirable that parents or caregivers assist with the instruction of staff in the administration of prescribed medication or health care procedures and assist with the administration itself at school. However parents are not legally obliged to do so.

In the event parents or caregivers agree to provide assistance at school in the administration of medication or health care procedures, the agreement should be confirmed in writing.

#### What is the legal liability of staff who administer prescribed medication or health care procedures?

Staff acting in the course of their employment enjoy the full legal protection available in relation to any personal liability claims. Like all employers, the Department is liable for the actions of its employees, unless the employee commits an act of serious and wilful misconduct. This is the legal principle of "vicarious liability".

To constitute "serious and wilful misconduct" would require some degree of intent or extreme recklessness by an employee. Carelessness, inadvertence, negligence or a simple mistake would not amount to serious and wilful misconduct.

The Department is legally obliged to indemnify (i.e. cover) its employees from any claims for compensation that may be made by persons who suffer injury as a result of the employee's actions. The only exceptions to this are where the actions of the employee amount to serious and wilful misconduct or the actions did not occur in the course of employment.

If a student is injured as a result of the administration of medication or health care procedures by a member of staff, the staff member will be protected as outlined above and need not fear any personal liability with regard to compensation.

To date, the Legal Services Directorate has not experienced any legal action by or on behalf of a student against a staff member in relation to the administration of prescribed medication or health care procedures.

#### Is it necessary to obtain an indemnity from parents in relation to the administration of prescribed medication or health care procedures?

The administration of prescribed medication or health care procedures is no different in legal terms to any other functions performed by school staff in supervising and caring for students. Accordingly it is *not* appropriate for parents or caregiver's to be asked to provide an indemnity in relation to the administration of prescribed medication or health care procedures.

#### If a student becomes unconscious at school and requires resuscitation, is it appropriate for the school to comply with a request from parents not to resuscitate the student?

On a few occasions principals have received requests like this. Under no circumstances should principals agree to them. Principals should ensure that all reasonable action is taken to provide the student with whatever medical or other assistance is required. This can include seeking assistance from outside agencies such as the NSW Ambulance Service or local health authorities.

#### What is the emergency response to a student who has a suspected anaphylactic reaction at school?

The Work Health and Safety Directorate has issued a [Safety Alert](#) setting out the action to be undertaken if a student has an anaphylactic reaction at school. The staff of schools who have students who have been diagnosed with anaphylaxis are advised to familiarise themselves with this safety alert.