



Legal Issues Bulletin

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Legal rights and responsibilities to a government school student who is diagnosed as being at risk of anaphylaxis

Executive Summary

The Principal of a school attended by a student who is at risk of anaphylaxis needs to be aware of the need to comply with legal obligations to the student imposed by the duty of care and under civil liability, discrimination, privacy, child protection and work health and safety legislation.

Principals should be aware that it is mandatory to comply with the [Anaphylaxis Procedures for Schools 2012](#). They are advised to complete [the checklists set out in those Procedures](#) and to refer to the checklists at the end of this Bulletin in order to be satisfied that legal obligations to the student have been met.

What are some of the key concepts I need to understand?

- **Adrenaline autoinjectors (EpiPen® or Anapen®)** contain a single fixed dose of adrenaline. They are used for the emergency treatment of anaphylaxis. More information about adrenaline autoinjectors can be found on the [ASCIA website](#).
- **Anaphylaxis** is a severe and sometimes sudden allergic reaction. It can occur when a susceptible person is exposed to an allergen (such as food or an insect sting). Reactions usually begin within minutes of exposure and can progress rapidly over a period of up to two hours. It is potentially life threatening and always requires an emergency response. For further information about anaphylaxis see [Appendix 5 of the Anaphylaxis Procedures for Schools 2012](#).
- **Anaphylaxis Procedures for Schools 2012** have been issued by the department of Education to assist staff support students who are at risk of anaphylaxis. It is mandatory for NSW government schools to comply with the procedures.
- **ASCIA** is the Australasian Society of Clinical Immunology and Allergy. It is the peak professional body of clinical immunology and allergy in Australia and New Zealand. [ASCIA's website](#) hosts a range of useful resources for schools that are supporting children who have been diagnosed as being at risk of anaphylaxis.
- **ASCIA Action Plan for Anaphylaxis** is signed and dated by a student's doctor and sets out the emergency response to be provided to that student. [General plans](#) are also available for both EpiPen® and Anapen® for use as posters or in a first aid kit which also contains a general use adrenaline autoinjector.

What emergency response must be provided to a student who seems to be having an anaphylactic reaction?

An EpiPen® or Anapen® should be administered and an ambulance must be called. It is important, if possible, to maintain line of sight with the student when calling an ambulance so current information can be given to the dispatcher who can provide advice about any further assistance that should be provided to the student. A mobile phone, including a personal mobile phone, can be used for this purpose.

If the student has been diagnosed as being at risk of anaphylaxis the steps set out in their ASCIA Action Plan for Anaphylaxis must be followed.

If the student has not been diagnosed as being at risk of anaphylaxis but appears to be having an anaphylactic reaction an EpiPen® or Anapen® should still be administered even if it belongs to another student. The symptoms of anaphylaxis and the emergency response to be provided are set out in the relevant [ASCIA Action Plan for Anaphylaxis \(general\)](#) should be followed and an ambulance called following the same process as outlined above.

More information about the emergency response to anaphylaxis is found in [Safety Alerts 35, 40 and 54](#).

Could I hurt the student if I give them an EpiPen® or Anapen® and they aren't having an anaphylactic reaction?

[ASCIA](#) advises that no serious or permanent harm is likely to occur from mistakenly administering adrenaline to an individual who is not experiencing anaphylaxis. On the other hand, failure to receive adrenaline in such an emergency can lead to death.

What are the legal rights of staff or a volunteer who provide an emergency response to a student who appears to be having an anaphylactic reaction?

Any staff member who provides an emergency response to a student who is having a presumed anaphylactic reaction is acting in the course of their employment.

In the unlikely event a staff member is sued for negligence as a consequence of administering an EpiPen® or Anapen® to a student, the department will defend the claim at no expense to the staff member and pay any damages, unless the staff member has committed an act of serious or wilful misconduct.

For an act to be considered "serious and wilful misconduct" there would need to be some degree of intent to harm the student or an act of extreme recklessness.

Carelessness, inadvertence, negligence or a simple mistake does not amount to serious and wilful misconduct. Parliament has also protected 'good samaritans' (such as volunteers) from any personal liability arising from genuine attempts to help someone in an emergency.

More information about the legal liability and rights of staff is found in [Legal Issues Bulletin No. 19 – Legal Liability and Rights of Staff in Relation to Serious Incidents](#).

How does the common law duty of care apply to students who are diagnosed as being at risk of anaphylaxis?

The department has a common law duty of care to take reasonable steps to keep students safe from foreseeable risk of harm while they are at school and engaged in school related activities. The department meets its duty of care obligations through the actions of its staff.

When a student is diagnosed as being at risk of anaphylaxis the exercise of the duty of care requires the development of an individual health care plan (including risk minimisation strategies and the student's individual ASCIA Action Plan for Anaphylaxis that has been signed and dated by their doctor and provided to the school by the student's parent). **All staff are expected to follow the student's ASCIA Action Plan for Anaphylaxis and administer an EpiPen® or Anapen® to the student if required in an emergency.**

Students at risk of anaphylaxis could also be subjected to bullying behaviour. As part of their Anti-bullying Plan, schools should maintain a climate of respectful relationships where bullying is less likely to occur. They should also develop and implement programs for bullying prevention, provide support for any student who is at risk of being bullied and empower the whole school community to recognise and respond appropriately to bullying and behave as responsible bystanders. A link to further information about this issue is in the checklists at the end of this Bulletin.

What about students who are undiagnosed with anaphylaxis but appear to be having an anaphylactic reaction?

The steps set out in [Safety Alert No. 40 and 54](#) must be followed.

Should the school have a general use adrenaline autoinjector?

A decision has been made that each government school should have a general use adrenaline autoinjector in its first aid kit. More information about this requirement can be found in [Safety Alert No. 40 and 54](#) and the [department's First Aid Procedures](#)

What obligations arise under civil liability legislation?

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

What obligations arise under work health and safety legislation?

The department is legally obliged so far as it is reasonably practicable to ensure the health and safety of all students who attend its schools. This requires considering a range of relevant matters including the likelihood of a hazard or risk occurring, the degree of harm that might result from the hazard or risk and the availability of ways to eliminate or minimise the risk.

Principals are advised to review the resources that have been developed by the department's Health and Safety directorate to assist schools to support students who are at risk of anaphylaxis. A link to these resources is set out in the checklist at the end of this Bulletin.

What legal rights or obligations could arise under child protection legislation in relation to a student who has been diagnosed with anaphylaxis?

Child Protection

The vast majority of parents or carers work cooperatively with schools and support the school's efforts to safely provide students with learning and support. On rare occasions a parent's response to their child being diagnosed with anaphylaxis or to the strategies that the school has developed to provide a student with learning and support may give rise to a reasonable suspicion that the student is at risk of significant harm.

In many cases the concerns may relate to the parent or carer's apparent neglect of their child's medical care needs but other risk factors may also be present. School staff should inform their principal of any concerns about a student who may be at risk of significant harm.

Principals need to consider whether a report to Community Services or contact with the department's Child Wellbeing unit is required. If in doubt or assistance is required the Child Wellbeing unit can be contacted on telephone number (02) 9269 9400.

[Interagency Cooperation and Information Exchange \(Chapter 16A of the Children and Young Person \(Care and Protection\) Act 1998\)](#)

School staff should also consider whether sharing information with other organisations would help in developing and implementing individual health care plans for the student diagnosed at risk of anaphylaxis.

For example the local public hospital may be able to assist in developing a student's health care plan by providing information about the student. It may also be possible for the school to work collaboratively with other organisations when developing learning and support plans for students. For example Ageing, Disability and Home Care might be able to assist the school in developing a communication strategy for a student with anaphylaxis who also has an intellectual disability to better enable the student to alert the school if he or she comes into contact with an allergen. A link to further resources dealing with this issue is found in the checklist at the end of this Bulletin.

What legal rights and obligations could arise under discrimination legislation?

Is anaphylaxis a disability for the purposes of discrimination legislation?

Yes. [Section 4 of the Commonwealth Disability Discrimination Act 1992](#) (DDA) defines disability broadly including as the presence in the body of organisms causing or capable of causing illness or disease. [Section 4 of the NSW Anti-Discrimination Act 1977](#) (ADA) defines disability in the same way.

What does this mean for schools?

An education authority may not **unlawfully discriminate** against a student at enrolment, by denying the student access to a benefit, expelling the student or subjecting them to any detriment or developing curricula that limits the student's access to curriculum. For conduct to be unlawfully discriminatory it needs to fit within the definition of direct or indirect discrimination. Information about direct and indirect discrimination can be found on the [Discrimination page on the Legal Services website](#).

How could discrimination law apply to a student who is at risk of anaphylaxis?

If a student with anaphylaxis seeks to enroll at or subsequently attends a school, consideration must be given to what reasonable adjustments can be made for the student. It is of key importance to consult with the student's parents or carers and the student (where practicable) about those adjustments.

A practical example of this could be where a student who is allergic to peanuts and nuts wishes to study food technology. It may be a reasonable adjustment in these circumstances to amend a recipe or provide the student with an oven and utensils that were specifically designated for that student's use. Given the range of potential allergies it would be less practicable to provide "allergen free" recipes, ovens and utensils to students.

An added benefit is that the reasonable adjustments implemented by schools will often also serve as the risk minimisation strategies that need to be put in place to satisfy the requirements of work health and safety legislation and the duty of care.

What rights and obligations arise under privacy law?

The [Privacy and Personal Information Protection Act 1998](#) and the [Health Records and Information Privacy Act 2002](#) places limitations on a school's collection, use and disclosure of personal and health information. It is important to note that using or disclosing information in compliance with the duty of care, work health and safety and child protection obligations will not breach privacy legislation. Duty of care or work health and safety obligations may also make it necessary to provide information to other parents or carers and students. Again there is no breach of privacy legislation in these circumstances.

Where it is necessary to provide information to staff, other parents or carers or students, the parent or caregiver and/or the affected student (where appropriate) should be informed of this beforehand where practicable. Principals should remind people who are provided with personal information about a student that it must be dealt sensitively, confidentially and for the reason the information has been collected.

Do any special rules apply to government preschools?

NSW Government preschools should follow the [Anaphylaxis Procedures for Schools 2012](#). Further from January 2013 all preschools are also required to comply under the [National Quality Framework](#) for Early Childhood Education and Care and are subject to mandatory training requirements set out in the [Education and Care Services National Regulations](#).

ASCIA e-training and ASCIA face to face anaphylaxis training are approved training under this requirement. Face to face training for childcare is offered through the NSW Anaphylaxis Education Program though there are other accredited providers. department preschools are advised to follow the training advice for NSW government schools.

Preschools are also directed to the [Education and Care Services National Law and Regulations](#).

Should a general use adrenaline autoinjector be taken on an overseas excursion?

A first aid kit, including a general use adrenaline autoinjector and the relevant ASCIA action plan must be taken on all overseas excursions. Principals should check any requirements that countries visited may have in relation to this medication being brought into the country. This can be done by sending an email to that country's embassy. A copy of any response received should be retained with the general use adrenaline autoinjector.

Inquiries should also be made of the airline carrier to confirm whether the adrenaline autoinjector can be carried onto the plane as part of hand luggage.

Further advice is available from your local WHS consultant and at:

<http://www.customs.gov.au/faq/Medications.asp>

<http://www.allergy.org.au/health-professionals/anaphylaxis-resources/ascia-travel-plan-anaphylaxis>

<https://www.allergy.org.au/about-ascia/info-updates/717-travel-information-for-people-at-risk-of-anaphylaxis>

What record keeping requirements apply to this situation?

It is critically important to maintain appropriate official records when supporting students with anaphylaxis in accordance with any legislative requirements. These include records of:

- the student's current ASCIA Action Plans for Anaphylaxis and expiry dates of adrenaline autoinjectors
- information provided by health care professionals
- meetings of the learning and support team and copies of programs and where applicable units of work from Year Advisors or other staff used to raise anaphylaxis awareness amongst students
- staff training (including casual staff) in both the ASCIA e-training and training by the NSW Health Anaphylaxis Education Program
- consultation with parents or carers, students, staff and others as appropriate during the development of learning and support plans for students (including individual health care, identification of reasonable adjustments and risk management plans)
- the development and implementation of those plans and their later review. It is also important to keep a record of who has been provided with the current version of the plan
- any information that was requested and/or obtained in relation to the student or his or her family (for example information obtained under Chapter 16A of the Children and Young Persons (Care and Protection) Act 1998)
- details of interagency collaboration that was undertaken in an effort to facilitate the student's learning and support including who was involved and what the outcome was.

Schools must observe any requirements imposed by privacy legislation with most records other than the emergency response plan being kept secure and accessible only to those staff who need to see them.

Staff should contact the [Records Management Centre of Expertise \(CoE\)](#) if they have specific records-related queries.

APPENDIX 1

Legal Compliance Checklist - Enrolment

	Issue	Yes	No	N/A
	Process			
1	Has the Counsellor been asked to provide information from the counselling file that is relevant to the development of a student's health care plan to the staff developing the plan?			
2	Has information from any previous setting (e.g. preschool) been checked by the Principal or nominee and information relevant to the development of a student's health care plan been provided to the staff developing the plan?			
3	If yes to either 1 or 2 – has this information been considered during the development of the individual health care plan? (Information about individual health care plans for students with anaphylaxis is found in the Anaphylaxis Procedures for Schools 2012's Action Steps for Principals . General information about health care plans is found on the department's public schools website .)			
4	Has the potential for obtaining information from, or working with, another organisation been considered during the development of the individual health care plan? (See Legal Issues Bulletin No. 50 – Exchanging Information with other organisations concerning the safety, welfare or wellbeing of children or young people .)			
5	Has the relevance of Work, Health and Safety resources been considered during the development of the individual health care plan? Examples include: <ul style="list-style-type: none"> ▪ Anaphylaxis checklist for workplace managers, ▪ Essential information for casual staff – students with complex health care needs, ▪ Managing exposure to allergens in the workplace – overview and key steps, ▪ Sample risk management plan – allergens in the workplace. 			
6	Have curriculum/teaching resources been considered when developing the individual health care plan? Examples include: <ul style="list-style-type: none"> ▪ PDHPE (Primary) Anaphylaxis ▪ PDHPE (Secondary) Getting to Know Anaphylaxis; Food Allergy Scenarios; Activity – Unsafe Scenarios; Support for PDHPE ▪ Technology (Secondary) Making Technology Learning Safe - Food Technology FAQs 			
7	Has the finalised individual health care plan been distributed to all relevant staff including classroom teachers and SLSOs who work with the student?			

	Issue	Yes	No	N/A
8	Has the Checklist in the Anaphylaxis Procedures for Schools 2012 been completed?			
9	Has the expiry date of the individual student's EpiPen® or Anapen® been noted in school records?			
10	Are the ASCIA Action Plan signed and dated by the student's doctor and EpiPen®/Anapen® stored together in an accessible place?			
11	Does the anti-bullying plan deal with the potential for bullying of students with anaphylaxis? – see the student welfare website .			
12	Should reasonable adjustments be considered for the student? – see the Disability Programs and Physical as Anything websites for further information about students with disability			
	Parents, Students and Staff			
13	If reasonable adjustments are considered - have the parents been consulted?			
14	Were parents consulted during the development of the individual health care plan?			
15	Have parents been asked to reinforce the risk minimisation strategies in the plan e.g. where applicable telling their child not to share food, reminding an older child to take their adrenaline autoinjector to school, and to tell a teacher if he/she is sick?			
16	Does a parent's response give rise to child protection concerns? – check the Mandatory Reporter Guide to see if further action should be taken?			
17	Was the student consulted during the development of the individual health care plan where practicable?			
18	If reasonable adjustments are considered - has the students been consulted where practicable?			
19	Was the student's understanding of the risk minimisation strategies in the individual health care plan tested?			
20	Has a communication plan been developed to raise student awareness e.g. about the need to be cautious when sharing food and what to do if a friend is sick?			
21	Have relevant staff been consulted about the risk minimisation strategies?			
22	Have relevant staff (including SLSO working with the student and classroom teachers) been informed about the student's health condition, the risk minimisation strategies in place to support them and the emergency response to be provided?			

	Issue	Yes	No	N/A
23	Have all staff been advised where student's ASCIA Action Plan and their EpiPen®/Anapen® is located?			
24	Have staff been advised about the Anaphylaxis Procedures for Schools 2012 and Safety Alerts 35 and 40			
25	Have staff been trained in anaphylaxis management by an approved provider in the last 2 years? Further information about anaphylaxis training for staff can be found on the student health section of the department's public schools website . Schools may also wish to consider using the School Administrative Managers Toolkit to enhance the capacity of SASS staff to provide an emergency response to a student who is having an anaphylactic reaction (this is in addition to, not in replacement of, the other training).			

APPENDIX 2

Continuing Legal Compliance Checklist

	Issue	Yes	No	N/A
	Process			
1	Are casual staff provided an orientation when they start school that includes advice about students with anaphylaxis, asthma, diabetes, epilepsy or other health condition requiring an emergency response; the location of the first aid room, details of where a student's emergency response plan and the medication required for an emergency response is kept? Is their training in anaphylaxis checked?			
2	Is the general use adrenaline autoinjector in the first aid kit?	•		
3	Is the ASCIA Action plan for anaphylaxis (general) for EpiPens in the first aid kit?	•		
4	Is there an annual check for expiry of EpiPen®/AnaPen® prescribed for a student/general use adrenaline autoinjector?	•		
5	Do staff know a replacement has to be requested/ordered if one is used/expired?	•		
6	Has the potential risk of upcoming activities in the new school year (e.g. courses of study, excursions, camps, TVET, sporting events, work experience, student exchange programs) been assessed and strategies implemented to eliminate or minimise risk?	•		
7	Has the annual review of individual health care plans been diarised?	•		
8	Has the relevance of Work, Health and Safety resources been considered during the review of the individual health care plan? Examples include: <ul style="list-style-type: none"> ▪ Anaphylaxis checklist for workplace managers, ▪ Essential information for casual staff – students with complex health care needs, ▪ Managing exposure to allergens in the workplace – overview and key steps, ▪ Sample risk management plan – allergens in the workplace. 	•		
9	Have teaching resources been considered during the review of the individual health care plan? Examples include: <ul style="list-style-type: none"> ▪ PDHPE (Primary) Anaphylaxis <p>PDHPE (Secondary) Getting to Know Anaphylaxis; Food Allergy Scenarios; Activity – Unsafe Scenarios; Support for PDHPE</p>	•		

	Issue	Yes	No	N/A
	▪ Technology (Secondary) Making Technology Learning Safe - Food Technology FAQs			
10	Have organisations the student is visiting – sport and recreation camps, field studies centres, outdoor education providers, participants in work placements and work experience - been advised of a health condition that may require an emergency response?	•		
11	Has the need to address the potential for bullying of students with anaphylaxis been reviewed? – see the Student Welfare website .	•		
	Parents, Student and Staff	•		
12	If reasonable adjustments are considered – have parents been consulted?	•		
13	Were parents consulted during the development of the individual health care plan?	•		
14	Have parents been asked to reinforce the risk minimisation strategies in the plan e.g. telling their child not to share food, take their adrenaline autoinjector to school with them (older students) and to tell a teacher if he/she is sick?	•		
15	Are parents regularly reminded to inform the school of changes to student's health condition each term? See sample article for the school newsletter .	•		
16	If reasonable adjustments were considered were students consulted?	•		
17	Were students consulted during the development of the individual health care plan?	•		
18	Has the student's understanding of their condition and the risk minimisation strategies in place to support them been tested?	•		
19	Are staff reminded at least once a year about the Anaphylaxis Procedures for Schools 2012 and Safety Alerts 35 and 40 ?	•		
20	Have staff been advised of the mandatory training requirements?	•		
21	Have staff been reminded about the location of the school's general use adrenaline autoinjector?	•		
22	Has the currency of the training of permanent staff in anaphylaxis, asthma, emergency care and CPR been checked?	•		
23	Are staff given the opportunity to practice with trainer EpiPen@s at least once a year?	•		
24	Have staff been told about the legal protection they will be given if they need to provide an emergency response to a student – are they aware of this bulletin and Legal Issues Bulletin no 19 – Legal liability and rights of staff in relation to serious incidents which involve potential risk of injury to persons in departmental premises?			

About Legal Services

Legal Services is here to support our government schools. **Staff can contact Legal Services by email or phone.**

Legal Services can only provide legal advice to departmental staff. It is not able to provide legal advice or assistance to parents, students or members of the public due to the potential for a conflict of interest.