

MINUTES
SENATE AND HOUSE INTERIM COMMITTEES ON INSURANCE AND COMMERCE
Room MAC B, Little Rock, Arkansas
Thursday, June 19, 2014

The Senate and House Interim Committees on Insurance and Commerce met jointly Thursday, June 19, 2014, at 1:30 p.m. in Committee Room MAC B in Little Rock, Arkansas.

Committee members present: Senators Jason Rapert, Chair; Keith Ingram, Vice Chair; Johnny Key and John Cooper. Representatives Tommy Wren, Chair; Robert Dale, Vice Chair; Harold Copenhaver, Joe Farrer, Mark Perry, Terry Rice, Fredrick Love, Stephanie Malone, James Word, Darrin Williams, Les “Skip” Carnine, John Vines, and Jeff Wardlaw.

Non-Voting members present: Representatives Bruce Cozart, Homer Lenderman, Douglas House, Kelley Linck, James Ratliff, and Mark Lowery.

Other legislators present: Senators Jane English, Missy Irvin, Bruce Maloch, Uvalde Lindsey, Gary Stubblefield, and Larry Teague. Representatives Kim Hammer, Eddie Armstrong, Scott Baltz, Charlotte Douglas, David Hillman, Karen Hopper, John Hutchison, Joe Jett, Mark McElroy, Chris Richey, Sue Scott, Mary Slinkard, Dan Douglas, David Whitaker, and David Fielding.

Representative Wren called the meeting to order.

Representative Wren stated the meeting’s purpose is to discuss why the Department of Human Services is mandating general liability insurance for school districts’ child care centers and Pre-K programs.

CONSIDERATION TO APPROVE FEBRUARY 20, 2014, MEETING MINUTES [EXHIBIT C]

Representative Dale made a motion to approve the February 20, 2014, meeting minutes. The motion was seconded by Senator Ingram, and without objection, the motion carried.

DISCUSSION OF LIABILITY INSURANCE FOR PRE-SCHOOLS

Mr. David Griffin, Associate Director, Licensing, Division of Child Care and Early Childhood Education, Department of Human Services (DHS), was recognized. He stated Act 778 of 2009 is the legislation behind the liability insurance requirement, was introduced in the 2009 legislative session as a shell bill, and at that point the title was, “An Act to Enhance Safe and Responsible Transportation for Children in Child Care.” It was put forth primarily by proponents of safer transportation, and that was the limit of the bill. During the session, the sponsor added language that would include the general liability requirements. Mr. Griffin thinks the general liability section was added to what was originally a transportation bill as a result of incidents that occurred at child care centers during the time the bill was going through the session.

Mr. Griffin stated the DHS did not sponsor the bill nor did it take an active part in the bill, however, the bill directed DHS to promulgate rules and regulations to require the appropriate amount of insurance. DHS met with the Arkansas Insurance Department (AID), as directed by Act 778, for approximately a year and a half trying to set reasonable liability rates both for general liability and for transportation. There were also discussions between DHS’s legal division and the School Board Association, Department of Education, and other parties to try and resolve that issue. The school board’s stance was that they were not subject to this requirement because of tort immunity. Beginning August or September of 2013, DHS’s legal services advised them that because of the way the legislation was drafted, there was not a clear exemption, and DHS would need to move forward with enforcement. On September 10, 2013, DHS sent a letter to all licensed providers including those programs on school district campuses, many of which are

operated by the school districts, that they would start enforcement July 1, 2014. He stated he had much feedback from superintendents around the state on how this will impact their program.

Mr. Mark White, Director, Office of Policy and Legal Services, DHS, stated there have been various discussions concerning what effect school tort immunity has on this requirement. The schools' tort immunity is created by the legislature, and the statute which creates that immunity expressly allows for the district to carry liability insurance. School districts are immune, except to the extent they carry liability insurance. For example, if a district has a policy that has \$1million worth of coverage, they can be held liable for negligence up to that coverage, and if the insurance policy pays, then it pays, but the school district cannot be held liable for anything outside the insurance coverage. He stated this is not the only situation in which school districts are required to carry liability insurance. They are also required to carry the same type of liability insurance on their vehicles any motorist is required to carry on his vehicle. This is a similar situation in terms of the tort immunity.

Representative Love asked about the financial impact to these institutions.

Mr. Griffin stated DHS did a financial impact study at the time of promulgation, which was approximately two years ago, and the rates were variable on home-based centers depending on the area of the state, the carrier they selected, other risk factors, and factors such as their license capacity. On a center of 75, which is average to large size, the rates range was from \$1000 a year, but most of them were from \$2500 - \$4700 a year. On homes, because the liability limits are a little lower, policies range in the \$400-\$600 amount if there are not other risk factors. The rates for a public school program would be very similar to the rates quoted earlier for a typical center.

Mr. White stated any school district has, by statute, immunity from damages for negligence, except to the extent they carry liability insurance. Cities and counties have this same type of immunity. A school district can be sued for a number of things, such as breach of contract, civil rights act, etc., but when it comes to a lawsuit for negligence, a school district is immune from being held liable for that negligence, except to the extent it carries liability insurance. He stated DHS is requiring school districts carry liability insurance on the pre-k population, because it was required by Act 778. There is no requirement in the statute that the schools carry liability insurance on their K-12 populations. DHS did not want to expand this beyond what the legislature is requiring.

Mr. Griffin stated the public schools' pre-k programs fall under the child care licensing act because of the age of children and the care being provided. He stated 20+ years ago there was a requirement for all programs to carry liability insurance, but in the mid 90s that was dropped, because this needed to be a business decision and not a decision the state would make. He said even if the pre-k programs were under the Department of Education, they would still be required to carry liability insurance.

Representative Vines asked about the number of districts having liability insurance in place.

Mr. Griffin stated he does not have this information, but there are approximately 464 programs operated on public school campuses. Of that number, probably a third are operated by other entities either leasing or borrowing space from school districts. DHS has approximately 300-350 programs actually operated by the schools that they license serving approximately 40,000 children.

If a child care program is operating 20 hours or less, it can opt out of licensing. If they are not a licensed child care facility, Act 778 would not apply to them, however a lot of the afterschool programs across the state have chosen to be licensed even though they are operating fewer hours in order to qualify for nutrition funding and the voucher program. Mr. Griffin stated if a program is being operated on school district property, the entity that has to carry the insurance is the entity that holds the license.

Mr. White stated a lawsuit was filed against DHS by three school districts challenging DHS's ability to impose the rule on school districts and also the promulgation of the rule. In the court hearing, the only issue addressed was the applicability of the rule to school districts. The districts asked for an injunction to prevent the enforcement of these requirements, and the judge denied this request. This denial has been appealed to the Supreme Court, and a decision is expected this fall. No formal opinion has been issued by the Attorney General's Office (AG), but the Governor was originally named in this lawsuit and was represented by the AG's office. In the AG's filing, they agreed with DHS's opinion on the interpretation of the rule.

Mr. Mike Mertens, Assistant Executive Director, Arkansas Association of Educational Administrators, was recognized and noted from his handout: **[Handout 1]**

- There is a long standing statute that provides school districts, counties, and cities, as political subdivisions of the State, with tort immunity (ACA 21-9-301). Public schools have operated effectively under this law for decades. School districts administrators and school boards want to ensure that they continue to be afforded tort immunity. The issue of how tort immunity interacts with the recent mandate by DHS that public schools provide general liability insurance is unclear. It is not clear whether or not this mandate supersedes or overrules the tort immunity statute. It is not clear whether or not a liability policy can be written just for a certain program on a school campus when children in this program interact with other students in the cafeteria, media center, auditorium, etc.
- Act 778 of 2009, An Act to Enhance Safe and Responsible Passenger Transportation of Children in Child Care, and for Other Purposes" is the basis for the DHS mandate. There is nothing in the law that required a school district that operates a licensed child care center or a pre-k program to purchase or maintain general liability insurance. There is no mention of "public schools" in this law whatsoever. This mandate seems to be strictly an interpretation by DHS officials. In the DHS letter to school districts, there is no rationale mentioned for the requirement. Since the requirement did not materialize until 5 years after Act 778 was enacted in 2009, AAEA sees no urgency or compelling reason that would form a basis for the need for this unfunded mandate for public schools.
- Pre-k programs are optional. School districts are not mandated to offer them. However, such programs generally have wide-spread support of parents and patrons.
- With school districts currently in the process of pricing and obtaining policies for next year, the total cost of this mandate cannot be calculated at the this point. However, policies that have been written to this point range from a cost of \$1500 per year for small rural districts to \$20,000 per year for a larger district.
- Suggested fix: School districts with licensed child care centers and pre-k programs located in school facilities be exempt from this general liability insurance regulation.

Dr. Greg Murry, Superintendent of Schools, Conway Public School District, was recognized and said there are three things concerning this issue:

1. Funding. The insurance rates for his district would be approximately \$4500 which would have to be taken from area of need.

2. Confusion concerning the rule.
3. Allowing tort immunity for pre-k programs would open the door for other programs to be subject to this rule. He suggests the legislature reword the law to exclude pre-k programs in public schools from this requirement.

Senator Rapert requested staff to contact the National Association of Insurance Commissioners (NAIC) to gather some information on this issue as it relates to other states.

Senator Rapert asked if DHS was subject to a penalty for not complying with ACT 778 for five years.

Mr. White stated that potentially if they did not pursue this, someone could bring a claim against them.

REPORTS RECEIVED FROM INSURANCE DEPARTMENT [EXHIBITS E1, E2, E3, E4, and E5]

Representative Wren noted the following reports from the Arkansas Insurance Department were received.

- 2014 Use and Impact of Credit in Personal Lines Insurance Premiums
- 2013 Annual Study of Medical Malpractice Insurance in Arkansas (ACA 23-61-114)
- 2013 Fire Loss Report by Arkansas County
- 2012 Annual Insurance Department Report
- 2012 Annual Study of the Workers' Compensation Insurance Market in Arkansas

There being no further business, the meeting adjourned at 2:28 p.m.