



STATE OF WASHINGTON
WASHINGTON STATE BOARD OF HEALTH

PO Box 47990 • Olympia, Washington 98504-7990

September 10, 2008

TO: Washington State Board of Health Members

FROM: Craig McLaughlin, Executive Director

SUBJECT: PROPOSED REVISION OF SCHOOL ENVIRONMENTAL HEALTH AND SAFETY RULES—BOARD OPTIONS FOR DECISIONS

Background and Summary

Today's meeting concludes the second of two hearings scheduled to gather oral testimony on the proposal to repeal chapter 246-366 WAC—Primary and secondary schools and to replace it with a new chapter 246-366A WAC. At this point, the Board will need to consider whether to close the hearing and decide on its next course of action.

The decision about whether to adopt is complicated, of course, by the multiple requests from legislators that the Board postpone adoption until the Joint Task Force on Basic Education Finance can address the rule and its associated costs in its final report, and until the Legislature has had a chance to consider funding options as it develops the 2009-11 budget.

I cautioned the Board at the last meeting against continuing its school rule deliberations until the October meeting because of a backlog of other pressing issues; however, we have since realized that, for procedural reasons, the Board may not adopt at today's meeting. The Board typically stops accepting written comments the week before a hearing. Because of a filing error, the period for receiving written comments concludes today. No time was set for the end of the public comment period, so the Board is required to accept comments up until midnight. An agency may not adopt a rule before the public comment period has ended.

Nevertheless, the Board has several questions it can—and I would argue should—address at this point in the proceedings:

1. Do the Board members need or want anything more from staff?
2. How do Board members want to receive and consider testimony received after the hearing?
3. Are there any changes the Board members would want made to the proposed rule?
4. What does the Board want to do about the request by legislators to postpone adoption?
5. How does the Board want to communicate its decision, as well as any other policy recommendations, to the Legislature, the Governor, and other agencies?

At the August 27 Board meeting, Board members agreed that a decision tree would be helpful. The discussion portion of the memo outlines some options for the Board and a decision tree will be available at the meeting.

Recommended Board Action

See discussion.

Discussion

It is common practice for the Board to adopt a rule immediately after concluding the public testimony portion of a hearing. It sometimes, however, continues a hearing when it needs additional information or when it has directed staff to draft possible changes. There also have been instances where the Board has chosen to adopt a controversial rule at the following meeting so members could have additional time for consideration.

The Board has a wide variety of options for how it might proceed, but basically the choices are:

- 1) **Move forward with adoption of the rule as published or with only minor (not “substantially different”) changes.** This might warrant a motion to continue the discussion portion of the hearing until the October meeting or later, but it is not necessary (see discussion below). It also would not be necessary to publish a supplemental notice. The Board would need to provide direction to staff about any proposed minor amendments it would like to have drafted between meetings for consideration when it chooses to adopt.
- 2) **Propose substantive changes to the rule to address specific drafting or policy issues.** This would require time to develop new language, provide for review of that language, publish a supplemental notice, allow for a new public comment period (at least 20 days), and conduct a new hearing. The soonest the Board could consider adoption would be early 2009—a time when the Legislature is in session. The Board would need to provide direction to staff about any changes that would need to be made to the draft rule prior to republication.
- 3) **Partially honor the legislators’ request by adopting certain sections but not others.** The Board could adopt the rule in stages, enacting the most critical, least controversial, or least expensive provisions now and delaying adoption of other provisions after allowing time for legislative action. Such changes would make the rule substantially different, so this approach would also require a supplemental notice and another round of public input. The Board would need to provide clear direction about which specific sections it wanted to enact as soon as possible and which it wanted to consider after the end of the legislative session.
- 4) **Agree to the legislative request.** The Board could simply close the hearing without taking action. The CR-102 runs for 180 days from the July 23 filing date, so it would expire in late January. If the Board is comfortable with the current draft substantially as written, it could file a continuance in January, which would keep the draft open for consideration. If it wants to make substantive changes it could withdraw the current CR-102 or simply allow it to lapse after 180 days and then file a new CR-102 at some future time, or it could file a supplemental CR-102 in January with the new language.

I think it is worth expanding on a few issues—what kinds of changes are allowed without publishing a supplemental CR-102, what kinds of motions might be appropriate, and what additional drafting work, if any, might be done if consideration is postponed. I also would like to discuss some other actions the Board might want to consider during its discussions today.

Substantive amendments: The notion of what kinds of changes would cause a rule to be substantially different than the published rule, and therefore necessitate a new CR-102 or a supplemental CR-102, is not clearly defined in statute. According to RCW 34.05.340, any variance, other than basic editing, would have to be justified in a document filed alongside the notice of adoption (the CR-103). An interested person would then have 60 days to petition the Board to amend the revised sections. That person would have to explain how the revised text differs substantially from the proposed text and propose a specific amendment. A valid petition would trigger a new round of rule making to consider the proposed amendment. The petition would not call into question the entire rule, only those portions identified as substantially different and addressed by the proposed amendment. There are, however, some types of changes that are so clearly substantially different that the Office of the Code Reviser may not accept a notice of adoption—the elimination of an entire section is likely one such example.

This means that the Board, in considering whether to amend, should consider not only how substantive a particular change is but also the risk that someone would care enough about the change to challenge it. For example, lowering the lighting standard for shower rooms, as one interested party has recommended, would probably be considered a minor change, while revisions to the indoor air quality sections might elicit a challenge. Given the high profile of this rule, the remaining controversy around its costs, and the threats of litigation that have been made in the past, I believe the Board should be very cautious about making changes to the proposed text.

Possible motions: I do not believe a motion to adopt this rule would be in order until the public comment period has ended. In fact, the Board could conclude its work today without any formal motion. A motion is not required to end a hearing—that can simply be done by the chair if there are no objections from members. Nor is a motion to continue a hearing necessary if the Board wanted an opportunity to vote on a motion to adopt in October. While the Board has traditionally handled decision making on a rule as part of a hearing, an executive head or a board or commission can take action after a hearing has concluded. When the Board has decided to extend its deliberations in the past, it has sometimes continued a hearing to make it clear that it had not reached resolution and to let stakeholders know when it would resume its deliberations and make a decision. Extending the hearing also allows the Board to formally accept additional oral testimony. But again, it does not appear to be required.

There may be reasons, however, to have a vote. I am not sure if there will be a consensus on the Board about whether to postpone consideration as requested by lawmakers or to adopt, but a motion and a vote on that motion would provide an opportunity for focused debate and a chance for members to register formally and publicly their support or opposition to one course of action or another. If that were desired, a motion to extend the hearing, while not necessary, could serve as a proxy vote on whether to adopt the rule. For example, a member could move to extend the

hearing until October to allow for consideration of a motion to adopt. People opposed to adoption before Legislative session could vote against the motion, while those wishing to adopt in October could support it. Alternatively, a member could move to table further consideration of the rule until after the 2009 legislative session and a vote could be taken on that motion.

Future changes: Even if the Board chooses to postpone adoption at this time, I believe it is important to get clear direction from the Board members about whether they want to see any changes made to the rule text based on testimony received. This will allow staff to be clear in conversations with stakeholders and lawmakers about the rule the Board would like to adopt, and would help us provide accurate and consistent cost estimates to people trying to craft budgets.

Additional actions: During the course of its rule making, the Board has taken a comprehensive look at the complex system of programs and authorities that impact school health and safety. It has discussed that in addition to adopting a modernized rule, it would, at the conclusion of its work, make other policy recommendations. Examples include:

1. Communicating with the Department of Health (DOH) and the Office of Superintendent of Public Instruction about guidance it would like to see included in the next edition of the *K-12 Health and Safety Guide*.
2. Recommending building codes changes to the Building Code Council.
3. Suggesting to OSPI changes it might consider the next time it revises the Washington Sustainable Schools Protocol.
4. Informing legislators about policy recommendations from the Board—for example, the Joint Legislative Task Force on Comprehensive School Health Reform has asked the Board to address whether its current authorities are adequate, and if necessary, recommend changes.

Whether the Board wants to move forward with adoption or agrees to postpone adoption, it seems incumbent on the Board to explain its decision and its likely future course of action in writing. It also seems clear that the Legislature will be dealing with school health and safety in some capacity, regardless of the Board's decision, during the upcoming session. While the Board must work within the existing regulatory framework, the Legislature has a much broader range of policy choices available to it. The Board might want to be proactive at this time in highlighting some policy considerations for the Legislature.

I am hopeful that the Board will have time today to discuss the nature, content, and timing of correspondence and any other documents that the Board might want to have prepared for consideration by the chair, the Environmental Health Committee or the full Board. I will be prepared to offer more specific suggestions at today's meeting.