



STATE OF WASHINGTON  
**WASHINGTON STATE BOARD OF HEALTH**

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June 10, 2009

**TO:** Washington State Board of Health Members

**FROM:** Environmental Health Committee, State Board of Health—  
Keith Higman, Karen VanDusen, and John Austin

**SUBJECT: PROPOSED REVISION OF SCHOOL ENVIRONMENTAL HEALTH AND  
SAFETY RULES: CHAPTER 246-366A WAC**

**Background and Summary**

The Washington State Board of Health has been working to update its school environmental health and safety rule, chapter 246-366 WAC, for more than six years. One of the most extensive stakeholder processes for any Board rule has led to the development of a replacement, proposed chapter 246-366A WAC. The Board's Environmental Health (EH) Committee believes this proposal meets the goals set at the beginning of this rule making, will protect children better, and is clearer than the existing rule. Many interested parties, however, including legislators, have concerns about the cost of implementation. At its October 8, 2008 meeting, the Board approved amendments to the proposed rule and then deferred a final vote on adoption until no later than today's meeting.

The final 2009-11 operating budget, passed April 2009 as ESHB 1244, includes language in section 222 prohibiting the Department of Health and the State Board of Health from implementing any new or amended school facility rules without being formally funded by the Legislature. If the Board adopts the school rule proposal from October 2008, it would create a new rule that could not be implemented during the next biennium and possibly beyond, and would repeal existing chapter 246-366 WAC on the effective date of the new rule. This could leave the state without any rule in place. The EH Committee considers this unacceptable in light of the Board's efforts to enhance protections for students in primary and secondary schools.

The EH Committee has considered various options for Board action on the rule proposal. It recommends the Board not adopt the proposed rule in its current published form. Instead it believes the Board should republish the proposed rule to remove the repealers for chapter 246-366 WAC and to amend chapter 246-366A WAC to make it absolutely clear that the Board is acting in accordance with the budget proviso and that the new rule may not be implemented or enforced without legislative funding or another form of legislative authorization. The current rule would remain active until superseded. With both rules on the books, the Legislature could then trigger implementation of the rule without the Board initiating new rule making, which could lead to extensive delays. The Board's extensive work would be firmly memorialized in rule.

The EH Committee recommends that the Board direct staff to file a supplemental CR-102 and schedule a hearing on an amended rule proposal that respects legislative direction and retains the existing rule. The process for filing a supplemental CR-102 could be completed to allow a hearing and vote of the Board as early as August 2009. Changes to proposed chapter 246-366A WAC should also include the amendments approved by the Board in October, minor housekeeping changes suggested by the attorney general's office to improve clarity, the replacement of effective dates with implementation dates to allow prompt phase-in by the Legislature, a severability section, and provisions for notifying schools and local health jurisdictions about the implementation of all or part of the new rule.

The EH Committee further recommends that an amended rule proposal specify an effective date of September 1 of the year of enactment of any appropriations bill or other statute that provides funding or otherwise removes restrictions on implementation of these new rules. It recommends that unless an earlier date is specified by the Board or the Legislature to take advantage of available funding, no portion of the new rule should be implemented prior to September 1, 2011.

Ned Therien, SBOH Staff, will further explain these recommendations of the EH Committee. Materials in your packets under Tab 11 include:

- EH Committee's illustrative proposed amendments to the rule proposal;
- Deferred Board motion from October 8, 2008;
- Amendments to rule text made by the Board in October 2008;
- CR-102 continuance;
- Preliminary Significant Analysis and Preliminary Small Business Economic Impact Statement reflecting the Board's 2008 amendments;
- Public comments;
- Board letter to Speaker Chopp of March 26, 2009.

### **Recommended Board Action**

#### **Recommended motion:**

*The Board directs staff to revise the rule proposal for chapter 246-366A WAC, school environmental health and safety, as published in WSR 08-15-174 and continued as WSR 09-04-049, with changes and additions considered and approved by the Board on October 8, 2008 and in accordance with direction provided today. The Board further directs staff to make any additional amendments recommended by the Board's Environmental Health Committee between June 10, 2009 and filing of a supplemental CR-102 for this rule proposal before July 8, 2009.*

## **Discussion**

The Board filed a CR-102 form for proposed rule making on July 23, 2008 to revise its rules on school environmental health and safety. It was published in the Washington State Register as WSR 08-15-174. The proposal would repeal chapter 246-366 WAC and replace it with a new chapter 246-366A WAC. The Board set the following goals in 2003 for this rule making:

- Proactively protect children's health;
- Be based on the best available science;
- Ensure accountability between school districts, their communities, and local health jurisdictions;
- Support and promote current school health and safety programs that work;
- Present the least burdensome regulatory structure;
- Be compatible and consistent with existing related regulations (such as building codes);
- Be realistic about resource limitations of schools and local health jurisdictions.

The Board held a public hearing on August 27, 2008 in Spokane. The hearing was continued on September 10 in Tumwater. The official comment period closed at midnight on September 10. The Board continued its deliberations on the proposal October 8 in Yakima. At that meeting, it adopted some amendments to the proposal, expressed unanimous support for the proposal as amended, and voted to defer a decision on the rule until a later meeting, but no later than June 2009. At the end of January 2009, the Board's Executive Director submitted a continuance for WSR 08-15-174, which kept the rule making open for another 180 days. According to the Office of the Code Reviser, the Board has until July 17, 2009 to adopt the rule proposal; withdraw the rule making proposal; file another continuance; or make additional revisions, file a supplemental CR-102, and schedule another public hearing.

During this rule revision process, members of the Legislature have shown an unusually high level of interest. At the request of several legislators, the Board organized an additional stakeholder workgroup and held work sessions in the second quarter of 2008 to help assure clarity in the rule language and agreement about costing assumptions. Around the time of the public hearings on the proposed rule, some legislators urged adoption, while others asked the Board to delay consideration of adoption until after the 2009 session to give the Legislature an opportunity to consider potential financial impacts.

At its October 8, 2008 meeting, the Board considered three motions.

- First it adopted by unanimous consent a motion to amend some of the language in the rule proposal.
- Then it considered a motion to adopt the rule proposal as amended. There was discussion that the rules would not be implemented effectively without adequate funding.
- Then it acted on a subsidiary motion to defer a vote on the motion to adopt the rule until the Legislature had an opportunity during the 2009 session to consider providing funding to support rule implementation. It voted to delay the vote on the rule proposal until no later than June 2009.

The Board's Executive Director provided testimony about the proposed rule and associated costs at legislative hearings during the 2009 session. Diminished state revenues during the recession (as well as reduced local revenues for schools) provided serious constraints. The Legislature considered companion bills (HB 2070 and SSB 5779) that would have restricted implementation of the proposed school rules unless the Legislature provided funding or another form of approval. Other bills dealing with capital improvements (ESHB 1216 and HB 2334) were considered that, in at least early drafts, would have provided funding to public schools to help them comply with the rules. These bills were either not passed by the end of session or were amended to remove mention of the Board's school rules. A bill that passed with mention of the Board's school rules was the operating budget bill, ESHB 1244. The final version of the bill contains language that restricts implementation of new or amended school rules by the Department or the Board through the 2009-2011 biennium unless formally funded through statute. The Legislature provided no funding for rule implementation. Section 222 of ESHB 1244 contains the following:

*"The appropriations in this section are subject to the following conditions and limitations: (1)...The department of health and the state board of health shall not implement any new or amended rules pertaining to primary and secondary school facilities until the rules and a final cost estimate have been presented to the legislature, and the legislature has formally funded implementation of the rules through the omnibus appropriations act or by statute..."*

The EH Committee does not interpret the legislative restriction on new school rule "implementation" until formally funded as meaning a restriction on "adoption." The words are not synonymous. The Board received a letter in late May 2009 from five legislators, however, suggesting the words are synonymous. The intent of five legislators is not legally the same as the intent of the Legislature, as passed in a bill or otherwise formally presented in legislative session. The Board may wish to discuss this letter before making a decision on adoption. Session law from 2009 clearly restricts "implementation."

Recognizing the legislative restriction on implementation, the Board has limited options. The rule proposal needs additional amendments to recognize these restrictions. It also needs amendments to remove the simultaneous repeal of all of existing chapter 246-366 WAC. Staff recommends that some additional amendments be made to increase clarity, to maintain the relative effective dates of several phased provisions, to add a severability section, and to remove the repealer for existing chapter 246-366 WAC. Some of these additional amendments could be considered substantive, which would warrant filing a supplemental CR-102 and scheduling another hearing before considering adoption. Failure to file a supplemental CR-102 when this many amendments are being made in the proposal could increase the potential for a procedural complaint being filed against the Board. The rule filing schedule in the Office of the Code Reviser makes it impossible to file a supplemental CR-102 after today for the Board to hold a hearing at its next meeting, July 8. However, it would be possible to file for a Board hearing in August. In this case, the Board may wish to consider scheduling a meeting for August 12.