

JOINT ADMINISTRATIVE RULES REVIEW COMMITTEE

REPORT TO THE LEGISLATURE ON RULES ADOPTED BY THE STATE BOARD OF HEALTH PERTAINING TO PRIMARY AND SECONDARY SCHOOL FACILITIES

June 11, 2015

Committee Members

Representative Zack Hudgins, Chair

Senator Karen Fraser

Senator Bob Hasegawa

Representative Joel Kretz

Senator Mark Miloscia

Senator Mike Padden

Representative Dean Takko

Representative David Taylor

Representative Norma Smith, Alternate

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Washington State Legislature

Representative Zack Hudgins, Chair

Joint Administrative Rules Review Committee

June 11, 2015

The Honorable Brad Owen
Lieutenant Governor of Washington
President of the Senate
P.O. Box 40482
Olympia, WA 98504-0482

The Honorable Frank Chopp
Speaker of the House
P.O. Box 40600
Olympia, WA 98504-0600

Dear Lieutenant Governor Owen and Speaker Chopp:

As required by Third Engrossed Substitute Senate Bill 5034 (Chapter 4, Laws of 2013 2nd ex. sess.) and Engrossed Substitute Senate Bill 6002 (Chapter 221, Laws of 2014), the undersigned members of the Joint Administrative Rules Review Committee hereby submit the Committee's Report to the Legislature on Rules Adopted by the State Board of Health Pertaining to Primary and Secondary School Facilities.

Sincerely,

Representative Zack Hudgins, Chair

Representative Joel Kretz

Senator Mark Miloscia

Representative Dean Takko

Senator Karen Fraser

Senator Bob Hasegawa

Senator Mike Padden

Representative David Taylor

PART I

BACKGROUND—REVIEW OF RULES ADOPTED BY THE STATE BOARD OF HEALTH PERTAINING TO PRIMARY AND SECONDARY SCHOOL FACILITIES

A. STATE OPERATING BUDGET PROVISOS.

1. Operating Budget Proviso—The State Board of Health.

The State Board of Health (Board), with technical support from the Department of Health (DOH), is required by statute to adopt rules controlling public health related to environmental conditions, including but not limited to heating, lighting, ventilation, sanitary facilities, and cleanliness in public facilities such as schools.¹ Pursuant to this statutory requirement, the Board adopted rules in 1971 that provided minimum environmental standards for educational facilities. The rules were later amended in the early 1990s. The current rules, as adopted and amended by the Board, are codified in chapter 246-366 of the Washington Administrative Code (WAC).

In July 2008, the Board filed new proposed rules (New Rules) to replace chapter 246-366 WAC for the stated purpose of providing a "more modern set of minimum environmental health and safety standards for school facilities to promote healthy and safe school environments."² The Board adopted the New Rules in August 2009, but delayed the effective date and implementation. The New Rules are codified in chapter 246-366A WAC. As of the writing of this report, it appears that no allegations have been made challenging the validity of the New Rules or the Board's rulemaking process.

The Board delayed implementation of the New Rules in accordance with a legislative directive. In the state operating budget for the 2009-2011 biennium, appropriations to the DOH were made subject to the following conditions and limitations:

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.³

Thereafter, each operating budget and supplemental operating budget adopted by the Legislature in 2010 through 2014 contained this same limitation and proviso. The Board has correspondingly

¹ RCW 43.20.050(2)(d).

² WAC 246-366A-001(1).

³ Chapter 564, Laws of 2009, Engrossed Substitute House Bill 1244.

extended the effective date of the New Rules several times. Currently, the projected effective date of the New Rules is July 1, 2017.

2. Operating Budget Proviso—The Joint Administrative Rules Review Committee.

The Joint Administrative Rules Review Committee (JARRC) provides legislative oversight and agency accountability regarding proposed or existing state agency rules and the rulemaking process. In reviewing a proposed or existing agency rule or an agency's rulemaking process, the JARRC may find that: (a) an existing rule is not within the intent of the legislature as expressed by the statute which the rule implements; (b) the rule has not been adopted in accordance with all applicable provisions of law; or (c) an agency is using a policy or interpretive statement in place of a rule.⁴ If the JARRC makes an adverse finding regarding an existing rule, the JARRC may, among other potential actions, recommend suspension of the rule.

In the state operating budget adopted by the Legislature for the 2013-2015 biennium, the JARRC was directed to review the new or amended rules pertaining to primary and secondary school facilities adopted by the Board.⁵ Specifically, the proviso requires the JARRC to determine:

- a. Whether the New Rules are within the intent of the Legislature as expressed by the statute that the rules implement, RCW 43.20.050;
- b. Whether the New Rules have been adopted in accordance with all applicable provisions of law; and
- c. Whether the Board is using a policy or interpretive statement in place of a rule.

The JARRC must report to the appropriate policy and fiscal committees of the Legislature the results of the committee's review and any recommendations that the committee deems advisable.

B. COMMITTEE REVIEW OF RULES ADOPTED BY THE STATE BOARD OF HEALTH.

As directed by the Legislature, the JARRC met on November 19, 2013, and May 13, 2015, to discuss and review the New Rules—the new or amended rules pertaining to primary and secondary school facilities adopted by the Board in August 2009. The JARRC has determined that, for purposes of this review: (1) the rules appear to be within the intent of the Legislature as expressed by the statute they implement; (2) the rules appear to have been adopted in accordance

⁴ RCW 34.05.630(3).

⁵ Chapter 4, Laws of 2013 2nd ex. sess., Third Engrossed Substitute Senate Bill 5034; and Chapter 221, Laws of 2014, Engrossed Substitute Senate Bill 6002.

with all applicable provisions of law; and (3) the Board does not appear to be using a policy or interpretive statement in place of a rule.

1. It appears that the New Rules adopted by the State Board of Health are within the intent of the Legislature as expressed by RCW 43.20.050.

The State Board of Health is required by statute to adopt rules controlling public health related to environmental conditions in schools for the purpose of protecting public health. The relevant statute, RCW 43.20.050, specifically provides that the Board must adopt rules

controlling public health related to environmental conditions including but not limited to heating, lighting, ventilation, sanitary facilities, and cleanliness in public facilities including but not limited to food service establishments, schools, recreational facilities, and transient accommodations.⁶

This rulemaking requirement was adopted in 1965, has remained largely unchanged over the past 50 years, and served as the statutory authority for the Board's adoption in 1971 of the current rules governing primary and secondary school facilities, chapter 246-366 WAC.

The New Rules adopted by the Board in 2009 and codified in chapter 246-366A WAC control public health and safety by governing environmental conditions in schools. For example, the New Rules:

- require school officials to maintain conditions within the school environment that will not endanger health and safety;
- require that construction of new school facilities or modification of existing school facilities comply with standards intended to prevent environmental health and safety risks; and
- regulate conditions in schools that may present a risk to health and safety, such as animals in school facilities, heating and ventilation, noise, lighting, restroom and shower facilities, water quality, water contaminants (*e.g.*, lead and copper), playground facilities, and school laboratories.

In short, adoption of the New Rules appears to accord with the Board's statutory obligation to control public health related to environmental conditions in schools, and the rules appear to be within the intent of the Legislature as expressed in the statute, RCW 43.20.050. Moreover, no allegations have been made to the JARRC alleging that the New Rules are not within the intent of the Legislature as expressed in the statute.

⁶ RCW 43.20.050(2)(d).

2. It appears that the New Rules adopted by the State Board of Health were adopted in accordance with all applicable provisions of law.

The State Board of Health is subject to a number of provisions of law when conducting rulemaking, including the Administrative Procedure Act (APA)⁷ and the Open Public Meetings Act (OPMA).⁸ It appears that the Board complied with all applicable provisions of law in adopting the New Rules.

First, it appears that the Board's rulemaking complies with requirements of the APA, and no allegations have been made to the JARRC asserting otherwise. The APA sets forth procedures that agencies, such as the Board, must substantially comply with when engaged in rulemaking in order for adopted rules to be valid. For example, the Board must:

- solicit comments from the public on the subject of possible rulemaking before filing a notice of proposed rulemaking with the code reviser;
- publish in the state register notice of any proposed rules prior to a rulemaking hearing;
- hold a public rulemaking hearing;
- provide an opportunity for submission of written and oral public comments; and
- file a certified copy of any adopted rules with the code reviser.

For adoption of the New Rules, the Board appears to have solicited pre-notice comments, published notice of the proposed rules in the state register, held public rulemaking hearings, convened a committee and workgroup with stakeholder involvement, and accepted written and oral public comments.⁹ The New Rules were ultimately adopted on August 12, 2009, at a public hearing, and a copy of the rules was filed with the code reviser on December 22, 2009.¹⁰

Second, it appears that the Board's rulemaking complies with requirements of the OPMA, and no allegations have been made to the JARRC asserting otherwise. The OPMA prescribes certain requirements for meetings held by public agencies, including requiring that all meetings of the governing body of a public agency are open and public and all persons are permitted to attend any meetings of the governing body.¹¹ State agencies must provide notice of regular meetings by filing a schedule of meetings with the code reviser. Actions taken at meetings that fail to comply with requirements of the OPMA are null and void.¹²

Prior to the meeting at which the Board adopted the New Rules, the Board filed notice in the state register of its intent to adopt the rules at a public hearing on August 12, 2009, at the

⁷ Chapter 34.05 RCW.

⁸ Chapter 42.30 RCW.

⁹ WSR 04-20-050; WSR 08-15-174; WSR 09-14-136;
<http://sboh.wa.gov/OurWork/Rulemaking/SchoolsEnvironmentalHealth>.

¹⁰ WSR 10-01-174.

¹¹ RCW 42.30.030.

¹² RCW 42.30.060(1).

John A. Cherberg Building on the Capitol Campus in Olympia, Washington.¹³ Moreover, the public was given instructions on when and how to attend, as well as how to submit written comments prior to the hearing. Thus, it appears that the Board's meeting was open and public.

Finally, the Board's rulemaking appears to have complied with all other applicable provisions of law, including statutory provisions in RCW 43.20.050 directing the Board to conduct rulemaking on school environmental conditions, as previously discussed. No allegations to the contrary have been submitted to the JARRC.

3. It does not appear that the State Board of Health is using a policy or interpretive statement in place of a rule.

The Board expressly conducted rulemaking and adopted new rules pertaining to primary and secondary school facilities, which are now codified in chapter 246-366A WAC. The existing rules that the New Rules are replacing are similarly codified in chapter 246-366 WAC. Thus, it does not appear that any policy or interpretive statement is being used in place of rules. Moreover, no allegations have been submitted to the JARRC challenging the Board's use of a policy or interpretive statement in place of a rule.

¹³ WSR 09-14-136.

PART II

RECOMMENDATIONS OF THE COMMITTEE

In conducting a review of the State Board of Health's (Board) adoption of new or amended rules pertaining to primary and secondary school facilities, the Joint Administrative Rules Review Committee (JARRC) finds that there are multiple options for addressing implementation of the rules. A majority of the JARRC makes the recommendations set forth below to the Legislature, without recommendation as to any specific one.

- A. *Create Model Rules.* The Legislature could create model rules to replace the new or amended rules developed by the Board pertaining to primary and secondary school facilities. Alternatively, the Legislature could establish a process for the creation of such model rules.
- B. *Authorize Implementation of the Rules.* The Legislature could authorize implementation of the rules developed and adopted by the Board by eliminating the proviso contained in the operating budget.
- C. *Authorize Partial or Incremental Implementation of the Rules.* The Legislature could authorize partial or incremental implementation of all or some of the rules developed and adopted by the Board.
- D. *Require Withdrawal of the Rules.* The Legislature could require the Board to withdraw or repeal all or some of the new or amended rules.
- E. *Require New Rulemaking.* The Legislature could require the Board to initiate a new rulemaking cycle and to develop a new, updated set of rules pertaining to primary and secondary school facilities.
- F. *Review and/or Update the New or Amended Rules.* The Legislature could, prior to authorizing implementation, require the Board to conduct a review and update of the new or amended rules and provide a final cost estimate to the Legislature for implementation of the updated rules. Alternatively, the Legislature could require the Board to review and identify the extent to which the new or amended rules need to be updated.
- G. *Require a Cost Study.* The Legislature could require and appropriate funds for a comprehensive cost study of the capital and operating impacts the new or amended rules adopted by the Board in 2009 would have if implemented.
- H. *Provide Technical Assistance.* The Legislature could create a mechanism for providing technical assistance to schools for implementation of the new or amended rules.

- I. *Provide for a Neutral Facilitator or Arbiter.* The Legislature could provide for a facilitator or arbiter to work through problems associated with implementation of the new or amended rules with interested stakeholders. For example, the Legislature could direct the William D. Ruckelshaus Center to act as a neutral resource for collaborative problem solving between interested stakeholders.
- J. *Require an Inventory of School Conditions.* The Legislature could require an inventory of and report on school conditions explaining the nature and scope of the problem that the rules adopted by the Board are intended to address.
- K. *Direct the Expenditure of Allocations for Maintenance, Supplies, and Operating Costs.* In allocating funds for primary and secondary school maintenance, supplies, and operating costs (MSOC) in the 2015-2017 biennial budget, the Legislature could require that expenditure of the MSOC funds further the goal of promoting healthy and safe school environments.
- L. *Require a Prioritized List of Rules.* The Legislature could require the Board to provide a list prioritizing implementation of some or all of the new or amended rules (*e.g.*, a list of the ten rules considered most important that should be implemented) and a cost estimate for implementing each prioritized rule on the list.
- M. *Refer Issue to Appropriate Committees of the Legislature.* The Legislature could refer the issue of the Board's adoption of rules pertaining to primary and secondary school facilities to the appropriate policy and fiscal committees of the Legislature for further consideration.
- N. *Take No Action.* The Legislature could decline to take any action regarding the new or amended rules.

APPENDIX

Excerpt: Section 219 (1) of 3ESSB 5034 (Chapter 4, Laws of 2013, 2nd ex. sess.)

1	(3) INSTITUTIONAL SERVICES	
2	General Fund--State Appropriation (FY 2014)	\$102,000
3	General Fund--State Appropriation (FY 2015)	\$20,000
4	General Fund--Federal Appropriation	\$68,981,000
5	General Fund--Private/Local Appropriation	\$39,355,000
6	TOTAL APPROPRIATION	\$108,458,000
7	*NEW SECTION. Sec. 219. FOR THE DEPARTMENT OF HEALTH	
8	General Fund--State Appropriation (FY 2014)	\$60,230,000
9	General Fund--State Appropriation (FY 2015)	\$59,198,000
10	General Fund--Federal Appropriation	\$536,074,000
11	General Fund--Private/Local Appropriation	\$139,455,000
12	Hospital Data Collection Account--State Appropriation	\$222,000
13	Health Professions Account--State Appropriation	\$104,722,000
14	Aquatic Lands Enhancement Account--State Appropriation	\$604,000
15	Emergency Medical Services and Trauma Care Systems	
16	Trust Account--State Appropriation	\$12,319,000
17	Safe Drinking Water Account--State Appropriation	\$5,267,000
18	Drinking Water Assistance Account--Federal	
19	Appropriation	\$14,806,000
20	Waterworks Operator Certification--State	
21	Appropriation	\$1,560,000
22	Drinking Water Assistance Administrative Account--	
23	State Appropriation	\$339,000
24	Site Closure Account--State Appropriation	\$159,000
25	Biotoxin Account--State Appropriation	\$1,323,000
26	State Toxics Control Account--State Appropriation	\$3,949,000
27	Medical Test Site Licensure Account--State	
28	Appropriation	\$4,737,000
29	Youth Tobacco Prevention Account--State Appropriation . . .	\$1,512,000
30	Public Health Supplemental Account--Private/Local	
31	Appropriation	\$3,236,000
32	Accident Account--State Appropriation	\$304,000
33	Medical Aid Account--State Appropriation	\$50,000
34	Medicaid Fraud Penalty Account--State	
35	Appropriation	\$987,000
36	TOTAL APPROPRIATION	\$951,053,000

1 The appropriations in this section are subject to the following
2 conditions and limitations:

3 (1)(a) The department of health shall not initiate any services
4 that will require expenditure of state general fund moneys unless
5 expressly authorized in this act or other law. The department of
6 health and the state board of health shall not implement any new or
7 amended rules pertaining to primary and secondary school facilities
8 until the rules and a final cost estimate have been presented to the
9 legislature, and the legislature has formally funded implementation of
10 the rules through the omnibus appropriations act or by statute. The
11 department may seek, receive, and spend, under RCW 43.79.260 through
12 43.79.282, federal moneys not anticipated in this act as long as the
13 federal funding does not require expenditure of state moneys for the
14 program in excess of amounts anticipated in this act. If the
15 department receives unanticipated unrestricted federal moneys, those
16 moneys shall be spent for services authorized in this act or in any
17 other legislation that provides appropriation authority, and an equal
18 amount of appropriated state moneys shall lapse. Upon the lapsing of
19 any moneys under this subsection, the office of financial management
20 shall notify the legislative fiscal committees. As used in this
21 subsection, "unrestricted federal moneys" includes block grants and
22 other funds that federal law does not require to be spent on
23 specifically defined projects or matched on a formula basis by state
24 funds.

25 (b) The joint administrative rules review committee shall review
26 the new or amended rules pertaining to primary and secondary school
27 facilities under (a) of this subsection. The review committee shall
28 determine whether (i) the rules are within the intent of the
29 legislature as expressed by the statute that the rule implements, (ii)
30 the rule has been adopted in accordance with all applicable provisions
31 of law, or (iii) that the agency is using a policy or interpretive
32 statement in place of a rule. The rules review committee shall report
33 to the appropriate policy and fiscal committees of the legislature the
34 results of committee's review and any recommendations that the
35 committee deems advisable.

36 (2) In accordance with RCW 43.70.250 and 43.135.055, the department
37 is authorized to establish and raise fees in fiscal year 2014 as
38 necessary to meet the actual costs of conducting business and the

Excerpt: Section 219 (1) of ESSB 6002 (Chapter 221, Laws of 2014)

1	General Fund--State Appropriation (FY 2014)	((\$100,000))
2		<u>\$239,000</u>
3	General Fund--State Appropriation (FY 2015)	((\$20,000))
4		<u>\$156,000</u>
5	General Fund--Federal Appropriation	((\$60,001,000))
6		<u>\$69,188,000</u>
7	General Fund--Private/Local Appropriation	((\$30,355,000))
8		<u>\$25,447,000</u>
9	TOTAL APPROPRIATION	((\$100,450,000))
10		<u>\$95,030,000</u>

11 *Sec. 219. 2013 2nd sp.s. c 4 s 219 (uncodified) is amended to read
12 as follows:

13 **FOR THE DEPARTMENT OF HEALTH**

14	General Fund--State Appropriation (FY 2014)	((\$60,230,000))
15		<u>\$59,915,000</u>
16	General Fund--State Appropriation (FY 2015)	((\$50,100,000))
17		<u>\$62,889,000</u>
18	General Fund--Federal Appropriation	((\$536,074,000))
19		<u>\$534,989,000</u>
20	General Fund--Private/Local Appropriation	((\$10,455,000))
21		<u>\$139,011,000</u>
22	Hospital Data Collection Account--State Appropriation	((\$220,000))
23		<u>\$201,000</u>
24	Health Professions Account--State Appropriation	((\$104,720,000))
25		<u>\$105,228,000</u>
26	Aquatic Lands Enhancement Account--State Appropriation	\$604,000
27	Emergency Medical Services and Trauma Care Systems	
28	Trust Account--State Appropriation	((\$10,310,000))
29		<u>\$11,194,000</u>
30	Safe Drinking Water Account--State Appropriation	((\$5,267,000))
31		<u>\$5,233,000</u>
32	Drinking Water Assistance Account--Federal	
33	Appropriation	((\$14,000,000))
34		<u>\$14,697,000</u>
35	Waterworks Operator Certification--State	
36	Appropriation	((\$1,560,000))
37		<u>\$1,554,000</u>

1 Drinking Water Assistance Administrative Account--
 2 State Appropriation ((~~\$339,000~~))
 3 \$336,000
 4 Site Closure Account--State Appropriation ((~~\$159,000~~))
 5 \$158,000
 6 Biotoxin Account--State Appropriation \$1,323,000
 7 State Toxics Control Account--State Appropriation . . . ((~~\$2,949,000~~))
 8 \$3,913,000
 9 Medical Test Site Licensure Account--State
 10 Appropriation ((~~\$4,737,000~~))
 11 \$4,722,000
 12 Youth Tobacco Prevention Account--State Appropriation . . . \$1,512,000
 13 Public Health Supplemental Account--Private/Local
 14 Appropriation \$3,236,000
 15 Accident Account--State Appropriation ((~~\$304,000~~))
 16 \$302,000
 17 Medical Aid Account--State Appropriation \$50,000
 18 Medicaid Fraud Penalty Account--State
 19 Appropriation \$987,000
 20 TOTAL APPROPRIATION ((~~\$951,953,000~~))
 21 \$952,074,000

22 The appropriations in this section are subject to the following
 23 conditions and limitations:

24 (1)(a) The department of health shall not initiate any services
 25 that will require expenditure of state general fund moneys unless
 26 expressly authorized in this act or other law. The department of
 27 health and the state board of health shall not implement any new or
 28 amended rules pertaining to primary and secondary school facilities
 29 until the rules and a final cost estimate have been presented to the
 30 legislature, and the legislature has formally funded implementation of
 31 the rules through the omnibus appropriations act or by statute. The
 32 department may seek, receive, and spend, under RCW 43.79.260 through
 33 43.79.282, federal moneys not anticipated in this act as long as the
 34 federal funding does not require expenditure of state moneys for the
 35 program in excess of amounts anticipated in this act. If the
 36 department receives unanticipated unrestricted federal moneys, those
 37 moneys shall be spent for services authorized in this act or in any
 38 other legislation that provides appropriation authority, and an equal

1 amount of appropriated state moneys shall lapse. Upon the lapsing of
2 any moneys under this subsection, the office of financial management
3 shall notify the legislative fiscal committees. As used in this
4 subsection, "unrestricted federal moneys" includes block grants and
5 other funds that federal law does not require to be spent on
6 specifically defined projects or matched on a formula basis by state
7 funds.

8 (b) The joint administrative rules review committee shall review
9 the new or amended rules pertaining to primary and secondary school
10 facilities under (a) of this subsection. The review committee shall
11 determine whether (i) the rules are within the intent of the
12 legislature as expressed by the statute that the rule implements, (ii)
13 the rule has been adopted in accordance with all applicable provisions
14 of law, or (iii) that the agency is using a policy or interpretive
15 statement in place of a rule. The rules review committee shall report
16 to the appropriate policy and fiscal committees of the legislature the
17 results of committee's review and any recommendations that the
18 committee deems advisable.

19 (2) In accordance with RCW 43.70.250 and 43.135.055, the department
20 is authorized to establish and raise fees in fiscal year 2014 as
21 necessary to meet the actual costs of conducting business and the
22 appropriation levels in this section. This authorization applies to
23 fees required for newborn screening, and fees associated with the
24 following professions: Agency affiliated counselors; certified
25 counselors; and certified advisors.

26 (3) \$150,000 of the state toxics control account--state
27 appropriation is provided solely to provide water filtration systems
28 for low-income households with individuals at high public health risk
29 from nitrate-contaminated wells in the lower Yakima basin.

30 (4)(a) \$64,000 of the medicaid fraud penalty account--state
31 appropriation is provided solely for the department to integrate the
32 prescription monitoring program into the coordinated care electronic
33 tracking program developed in response to section 213, chapter 7, Laws
34 of 2012, 2nd sp. sess., commonly referred to as the seven best
35 practices in emergency medicine.

36 (b) The integration must provide prescription monitoring program
37 data to emergency department personnel when the patient registers in