

Education

State Board of Education

Educational Facilities

Safe Drinking Water

Adopted Amendment: N.J.A.C. 6A:26-12.4

Proposed: February 18, 2020, at 52 N.J.R. 183(a).

Adopted: July 6, 2020, by the New Jersey State Board of Education, Kevin Dehmer, Acting Commissioner, Department of Education, and Acting Secretary, State Board of Education.

Filed: July 6, 2020, as R.2020 d.072, **without change**.

Authority: P.L. 2016, c. 10 and P.L. 2017, c. 86.

Effective Date: August 3, 2020.

Expiration Date: November 20, 2020.

Summary of Public Comments and Agency Responses:

The following is a summary of the comments received from members of the public and the Department of Education's (Department) responses. Each commenter is identified at the end of the comment by a number that corresponds to the following list:

1. Patricia Naples, Facilitator, Assumption Regional Catholic School
 2. Susan Young, Executive Director, New Jersey Association of School Business Officials
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1. Comment: The commenter stated that, in 2016, New Jersey mandated testing of all drinking water outlets every six years in all public schools. The commenter also stated that the regulations require school districts to report water quality test results to the Department and parents only if positive test results are at or above the Environmental Protection Agency's (EPA's) actionable level of 15 parts per billion (ppb). The

commenter further stated that there is no State policy mandating water testing in private or Christian schools. The commenter stated her students collected and analyzed data regarding water quality in New Jersey schools to determine, in part, if the quality of water in private schools is comparable to the quality of water in public schools in the same geographical area. The commenter noted that with a sample size of five private schools, a comparable statistical test was not possible, but an analysis of the results of testing seemed to indicate dramatically lower levels of lead in private schools compared to public schools in the same geographical area. The commenter recommended that the actionable level of lead should be much lower than the EPA's recommendation of 15 ppb, as bottled water is allowed to have no more than five ppb. The commenter also stated that, ideally, the action level should be zero ppb and that water in all schools should be tested yearly. (1)

Response: The "lead action level" defined at N.J.A.C. 6A:26-1.2 is based on the Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq., in which the Legislature determined to utilize the framework of the Federal Safe Drinking Water Act and gave authority for enforcing the act to the New Jersey Department of Environmental Protection. As the Legislature has placed authority with the New Jersey Department of Environmental Protection to set the drinking water standards, the Department of Education has determined to tie the Department's rules to the same standard that triggers action by a drinking water system to implement steps to reduce lead levels in drinking water.

The Department disagrees that it is best to require that water in all schools be tested on a yearly basis for lead. The adopted amendments, which shorten the time period between required testing by half (from six to three years), will ensure that public schools remain vigilant in their monitoring of drinking water outlets and that the amount of time students and staff could be exposed to undetected elevated lead levels is limited. A three-year testing cycle also is consistent with the testing requirements of the New Jersey

Department of Children and Families and the Federally required monitoring schedule for lead and copper in schools that have their own water systems (referred to as non-transient non-community water systems or NTNCWSs). Separately, Federal rules may require some NTNCWSs to engage in more frequent and rigorous testing based on compliance history, but the Department does not agree that more frequent testing should be mandated, or that it is necessary for all school districts.

N.J.A.C. 6A:26-12.4(e)2 requires school districts to notify parents or guardians and the Department if any results exceed the permissible lead action level. The notification must include that the school district immediately ended use of each drinking water outlet where the test result exceeded the permissible lead action level.

Nonpublic schools, which are private entities, do not receive State aid to construct school facilities and are not subject to the balance of the facilities, requirements in Chapter 26. Therefore, the Department cannot mandate lead testing in nonpublic schools on a permanent basis as it does for public schools in the existing rules as proposed for amendment.

2. Comment: The commenter stated that part of the student research on water quality in New Jersey schools sought to determine the following: if there is a relationship between socioeconomic factors of a school district and the quality of its drinking water; if there is a simple and inexpensive method for students to test the water they are drinking; and whether there are ways to educate the community, especially new parents and parents of young children, about the developmental and long-term effects of lead exposure in humans. The commenter stated that collecting data on the number of positive lead results and lead levels in New Jersey school districts' drinking water was a challenging task. The commenter also stated that the Department does not maintain a central database and does not require school districts to report results unless they are above the actionable level of 15 ppb. The commenter obtained, from New Jersey Futures, data that were incomplete

and searched each school's website. The commenter stated that website posting of water testing results is not consistent across school districts, a number of schools have not posted results, and there is not a designated place to post results. The commenter recommended that all schools should be required to post water quality test results, even if they do not meet or exceed the "actionable level," results should be collected and maintained in a central location that is easily accessible to New Jersey citizens, and all school districts should be required annually to report water test results to parents. (1)

Response: The Department thanks the commenter for the support of the amendments at N.J.A.C. 6A:26-12.4(e)2 that will require school districts to post on their websites the results from the testing required pursuant to N.J.A.C. 6A:26-12.4(f)1 and the written notification required at N.J.A.C. 6A:26-12.4(f)2. The adopted amendments also will require results to remain publicly available in accordance with the State records retention schedule. The Department also thanks the commenter for the support of the amendment at N.J.A.C. 6A:26-12.4(h) that will require district boards of education that test drinking water outlets more frequently than required to meet the notification requirements at N.J.A.C. 6A:26-12.4(e) and (f) and to make the most recent results for each facility available on the district board of education's website.

In November 2019, the Department launched a webpage [Summaries of Test Results](https://www.nj.gov/education/lead/summaries/#/) (<https://www.nj.gov/education/lead/summaries/#/>) to provide community members with access to a database containing information regarding the results of lead testing in New Jersey school districts, charter schools, and other entities covered by the Department's safe drinking water rules at N.J.A.C. 6A:26-12.4. The webpage was designed specifically to enhance transparency of school drinking water quality information by providing, in a central location, the lead testing results of every school district or entity that is required to test pursuant to N.J.A.C. 6A:26-12.4. The webpage includes the date of each school district's or entity's most recent lead sampling and

analysis, whether that analysis discovered an exceedance of the permissible lead action level in any water sample, and local contact information. The Department is working with the New Jersey Department of Environmental Protection (DEP) to explore potential enhancements to the database using DEP's existing water quality reporting procedures and infrastructure.

3. Comment: The commenter stated that any water outlet in a school used for drinking water or cooking should be filtered using an approved filter for the removal of lead and other contaminants. (1)

Response: The comment is outside the scope of the rulemaking, as it solely addresses the testing of drinking water in school facilities, and does not impose any particular required remediation.

4. Comment: The commenter expressed general support for the intent of the proposed amendments in the interest of the health and welfare of school district staff, students, and the public. The commenter stated that a series of changes will create a more effective and cost-efficient methodology for carrying out the intent of rules, as proposed for amendment, and a reasonable approach to potential non-compliance.

In reference to N.J.A.C. 6A:26-12.4(g), the commenter stated that requiring all school districts to retest in the same year to simplify compliance will create a seller's market for vendors and result in price increases and potential shortages of services, especially since the testing is best performed during specific lulls in school activities that are common among school districts. The commenter suggested that the Department stagger the testing, perhaps to coincide with the monitoring cycle under the New Jersey Quality Single Accountability Continuum (NJQSAC) that occurs every three years on a cohort basis. The commenter also stated that staggering required testing will spread out the reimbursement process over three years, as well. (2)

Response: The Department thanks the commenter for the support of the goal to increase safeguards for students, school district staff, and the public.

The Department disagrees that the required testing year needs to be staggered over three years. Requiring all school districts to test in the same year will simplify compliance for school districts and the Department. As to the potential price increases and shortages of service, the Department is confident that school districts will be able to complete the required testing in each compliance year because school districts will know, in advance, the predictable schedule of when to conduct testing and will have a year to complete the testing. Because the last testing cycle allowed school districts to demonstrate compliance with testing conducted before the adoption of State-level testing requirements, some school districts did not receive reimbursement for testing because it was conducted before the reimbursement period set forth by the Legislature in the appropriation. Consequently, the Department maintains that a single test year will help school districts conduct the testing within the time they need to do so to be eligible for reimbursement, which, in turn, will create more predictability for budget planning purposes.

5. Comment: The commenter stated that the possible actions at proposed N.J.A.C. 6A:26-12.4(l)2 and 3 for failure to comply with any requirement in the section seem rather severe. The commenter stated that the Department's initiation of an investigation by the Office of Fiscal Accountability and Compliance (OFAC) and the withholding of State aid seem severe, especially since the failure to comply is with "any" requirement and that could include simple oversight items. The commenter suggested a tiered or incremental penalty structure, such as the loss of points on NJQSAC monitoring instead of an OFAC investigation and the withholding of State aid only after repeated demands. (2)

Response: The Department disagrees that the initiation of an OFAC investigation and the withholding of State aid are too severe for a school district's failure to comply with the rules that require the testing of drinking water for the presence of lead. Most school districts comply with the required testing, and the Department is confident that non-compliance will continue to be rare. Exposure to lead-contaminated drinking water poses serious health problems for teachers and school personnel, and particularly for children. A school district's failure to comply with the required testing is a serious matter. The loss of points under NJQSAC is already a potential outcome of a failure to comply with the testing rules since testing pursuant to this section is a required component of a school district's Health and Safety Evaluation of School Buildings Checklist. If a school district were to demonstrate an unwillingness to comply with the necessary safety measures required by this section, the Department would use all available and necessary tools, which may include initiation of an OFAC investigation and the withholding of State aid, to ensure the safety of students in school facilities. As with other situations when the Department can initiate an OFAC investigation or withhold State aid, the Department will use these tools in a measured fashion that aligns with the severity and circumstances of a school district's non-compliance.

6. Comment: The commenter suggested that the implementation of the three-year testing cycle be delayed for a year given the current COVID-19 pandemic and the extended closure of schools. (2)

Response: The Department disagrees that the more frequent testing required under this section needs to be delayed at this time due to the ongoing COVID-19 state of emergency. The Department chose the 2021-2022 school year as the initial Statewide required testing year so the testing will occur in the school year after most school districts will be able to complete the water infrastructure improvement projects funded by the

Securing Our Children's Future Bond Act, which is now anticipated to begin in the fall of 2020. However, the Department is actively monitoring the ongoing COVID-19 state of emergency in conjunction with required compliance for school districts and, through notices of rule waivers and modifications, has made adjustments to rules throughout Title 6A of the New Jersey Administrative Code that are infeasible given the current health crisis, and will continue to do so as necessary.

7. Comment: The commenter stated that a group of her students carried out a project regarding water quality in New Jersey schools that revealed the following findings:

- Water is essential for life;
- For years, United States citizens have believed that the water in their homes, schools, and communities is safe for consumption;
- Eleven cities and two counties in New Jersey have poorer water quality than Flint, Michigan, which has an ongoing water crisis. Some of the 11 cities in New Jersey have been aware of the contaminants, specifically lead, in their drinking water since the early 2000s;
- Lead rarely occurs naturally in water;
- Aging infrastructure, lead pipes and solder, and lead-containing water fountains and faucets, along with water possibly sitting in pipes for extended periods of time, allow lead to leach into water.
- Increased levels of lead in drinking water may lead to higher lead levels in people's blood and low-level exposure to lead may have a negative impact on a child's development affecting behavior, attention, bone growth, and decreased IQ;
- School buildings in the United States are in use eight to 10 hours a day, but not at night, over the weekend, or during holiday breaks; and

- School drinking water may be a source of lead exposure for children as young as three years old who spend a majority of their day-time hours at school. (1)

Response: The Department thanks the commenter for highlighting New Jersey students' research results and advocacy that draw attention to the serious health concerns related to the presence of lead in drinking water in schools.

Federal Standards Analysis

The adopted amendments exceed provisions of the Federal Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq., that require some of the drinking water outlets in schools to be tested. The rules require all drinking water outlets in schools to be tested because the need to ensure students and school staff are not exposed to lead in drinking water is of paramount importance to the Department. Testing every drinking water outlet in school facilities is achievable under current technology and the Department reimbursed entities covered by this subchapter approximately \$3,280,146 for the initial round of testing conducted during Fiscal Year 2017.

Full text of the adoption follows:

Text