

Education

State Board of Education

Educational Facilities

Safe Drinking Water

Proposed Amendments: N.J.A.C. 6A:26-12.4

Authorized By: New Jersey State Board of Education, Lamont O. Repollet, Ed.D.,

Commissioner, Department of Education, Secretary, State Board of Education.

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

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2020-017.

Submit written comments by April 18, 2020, to:

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The agency proposal follows:

Summary

The Department of Education (Department) proposes to amend the rules at N.J.A.C. 6A:26 that require testing for lead in the drinking water of all applicable New Jersey educational facilities.

The health, safety, and welfare of the children in the State are of the utmost importance to the current Administration, including the Department and the Department of Environmental Protection (DEP). The proposed rulemaking is part of the Administration's approach to enhance rules and policies regarding lead testing and remediation in school districts, charter schools, renaissance schools, jointure commissions, educational services commissions, approved private schools for students with disabilities, State-funded early childcare facilities, and receiving schools (collectively referred to hereafter as "district boards of education").

First, the proposed rulemaking will require district boards of education to test for lead every three years, rather than the current requirement of every six years. Second, the proposed rulemaking also will include enhanced enforcement measures against non-compliance.

Lastly, the Department has enhanced transparency by updating its webpage about testing for lead in school drinking water to include the following district-reported information: the date of the most-recent lead testing, the latest statement of assurance, and a link to actual testing results. Through this enhancement, the public can access specific lead testing results and can see if a district board of education is compliant with the requirements in the lead testing regulations.

Exposure to lead-contaminated drinking water poses serious health problems, particularly for children, as well as for teachers and school personnel. The risk of lead contamination can come from pipe and plumbing fixtures in educational facilities. The risk of lead contamination also can come from a public water supplier, which has independent testing requirements. The rules ensure drinking water testing of all drinking water outlets and food preparation sources is conducted in all applicable education facilities in the State.

Existing N.J.A.C. 6A:26-12.4, Safe drinking water, requires all district boards of education to test all drinking water outlets every six years. The proposed amendments will

increase the frequency of testing to every three years, which will ensure that 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 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). The proposed amendments will also require that all school districts conduct testing in the same school year (that is, the 2021-2022 school year and every three years thereafter), which will simplify compliance for school districts and the Department and make the reimbursement for required testing more predictable for budgetary planning purposes for school districts and the Department.

Under specially adopted rules authorized by the Fiscal Year 2017 State budget (P.L. 2016, c. 10), all district boards of education were required to conduct testing as soon as practicable, but no later than July 13, 2017. The rules allowed for a one-year extension for testing by district boards of education that provided written documentation that there was no certified laboratory available to conduct testing by the 2017 deadline. The rules also allowed district boards of education to apply to the Department for an exemption from the initial testing if the district board of education could demonstrate that it complied with or exceeded the new testing requirements, including required public notifications, by July 13, 2017. All district boards of education currently are required to retest six years after the initial testing, even if the testing was conducted prior to the July 13, 2017, deadline, and every six years thereafter.

The Department's proposed amendments are based upon the Administration's initiative to enhance lead testing rules and policies for district boards of education. The proposed

amendments also incorporate feedback that the Department has received from district boards of education since the initial adoption of the lead testing rules.

The proposed amendments will advance the Department’s vision to increase educational equity for all students by increasing the required frequency of lead testing by all district boards of education and enhancing the public’s access to information regarding lead testing results.

On December 16, 2019, the Department, in conjunction with other agencies, proposed, in the New Jersey Register, rules that implement the Securing Our Children’s Future Bond Act and provide grants to district boards of education for water infrastructure improvements to remediate water contamination discovered through the testing required by N.J.A.C. 6A:26-12.4 (see 51 N.J.R. 1819(a)).

The following summarizes the proposed amendments:

Subchapter 12. Safety Requirements for School Facilities

N.J.A.C. 6A:26-12.4 Safe drinking water

The Department proposes amendments at N.J.A.C. 6A:26-12.4(e)1, which currently requires district boards of education to make the test results of all water samples publicly available at the school facility and on the district board of education’s website, to add “in accordance with (f) below” after “school facility.” The Department also proposes to add “make the results from the most recent required Statewide testing available” before “on the district board of education’s website” to ensure the most recent testing results are publicly available on a school district’s website. The proposed amendment also will codify the Department’s guidance that district boards of education cannot arbitrarily remove lead testing results from their websites.

The Department proposes amendments at N.J.A.C. 6A:26-12.4(e)2, which currently requires a district board of education to notify parents or guardians of school children attending

the facility and the Department regarding the following: elevated lead levels, the measures taken to immediately end use of each drinking water outlet exhibiting elevated lead levels, and the measures taken to ensure alternate drinking water and information regarding the health effects of lead have been made available to all students and staff members. The Department proposes to also require the written notification provided to parents and the Department to be posted on the district board of education's website to increase the availability of information to the public. The Department proposes to recodify the paragraph into separate provisions for clarity purposes. The Department also proposes adding new N.J.A.C. 6A:26-12.4(e)2ii to ensure notification includes "[a]ny remedial actions taken or planned by the district board of education" to enhance the information provided to the Department and the community. The Department also proposes to amend N.J.A.C. 6A:26-12.4(e)2iii to ensure the alternate drinking water has been made available to all students and staff members at the school(s) where the water outlet(s) that exceeded the permissible lead action level is located.

The Department proposes new N.J.A.C. 6A:26-12.4(f) to require district boards of education to keep their test results of all water samples publicly available in accordance with the 30-year timeline established by the Department of the Treasury in the Records Retention Schedule under record series number 0021-0000. The proposed amendment references the required time period for the results to remain publicly available.

The proposed amendments at recodified N.J.A.C. 6A:26-12.4(g) will require district boards of education to test for lead in a Statewide required testing year, which will be every third school year beginning with the 2021-2022 school year and subsequently occurring in the 2024-2025 school year, rather than the current requirement of every six years for the reasons previously stated.

The Department proposes new N.J.A.C. 6A:26-12.4(h) to require a district board of education to follow the notification requirements at N.J.A.C. 6A:26-12.4(e) and (f), if the district board of education conducts lead testing more frequently than the proposed three-year cycle. The Department proposes new N.J.A.C. 6A:26-12.4(h)1 to require a district board of education that conducts lead testing more frequently than the proposed three-year cycle to make the most recent results for each facility available on the district board of education's website. The proposed rule will ensure that district boards of education take the same steps for notification of testing results, regardless of whether the lead testing is voluntary or required by the State.

Recodified N.J.A.C. 6A:26-12.4(i) requires district boards of education to submit annual statements of assurance to the Department confirming that lead testing was completed, the required notifications were provided, and that alternate drinking water continues to be made available to students and staff. For consistency purposes, the Department also proposes an amendment to add "in accordance with this section" following the requirement to confirm that the district board of education provided alternate drinking water to students and staff, as this language follows the lead testing and notifications requirements.

The Department proposes to delete existing N.J.A.C. 6A:26-12.4(h), which permits district boards of education that conducted lead testing in the previous five years to request an exemption for testing that is due on the Department's cycle. The Department proposes to delete this subsection because school districts will be required to conduct testing in accordance with the Statewide required testing school year, as set forth at recodified N.J.A.C. 6A:26-12.4(g), which will ensure that all school districts follow the same compliance timeline.

Recodified N.J.A.C. 6A:26-12.4(j) allows a district board of education to seek an exemption from testing if the district board of education can demonstrate it does not use any

drinking water outlets for consumption or food preparation in any of its facilities. District boards of education that seek an exemption because they do not use drinking water outlets must submit to the Department an application documenting no drinking water outlets are used in the facilities and the provision(s) for an alternative drinking water source. The Department proposes amendments to require a district board of education that is granted this type of exemption to either begin testing procedures or reapply for it no later than June 30 of each Statewide testing school year as set forth at recodified N.J.A.C. 6A:26-12.4(g), instead of the previous six-year timeline. The proposed amendment will ensure that all school districts follow the same compliance timeline.

Recodified N.J.A.C. 6A:26-12.4(k) provides that district boards of education may be eligible for reimbursement of lead testing. The Department proposes amendments to replace the 2016 dates that applied to the initial round of testing with “after July 1, 2021,” which is when the proposed change to a three-year testing cycle will go into effect. The Department also proposes to state that a school district that conducts additional testing in a year other than the Statewide required testing school year as set forth at recodified N.J.A.C. 6A:26-12.4(g) shall not be eligible for reimbursement. The proposed amendment will align the reimbursement timeline to the compliance timeline at recodified N.J.A.C. 6A:26-12.4(g).

The Department proposes new N.J.A.C. 6A:26-12.4(l) to specify what may result from a district board of education’s failure to comply with any of the section’s requirements. The proposed results include disqualification for reimbursement of testing, the Department’s initiation of an investigation by the Office of Fiscal Accountability and Compliance, and the Commissioner’s withholding of State Aid.

As the Department has provided a 60-day comment period in this notice of proposal, this notice is excepted from the rulemaking calendar requirement, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed amendments will positively impact students, educators, school districts, and families by ensuring more often that safe drinking water is available in school facilities. As exposure to lead can pose a hazard to students, particularly in preschool and early grades, the proposed amendments will ensure school facilities are properly tested every three years for elevated lead levels in water available to students and employees for drinking or other consumption.

Economic Impact

The proposed amendments establish a mechanism for reimbursement for the costs associated with water supply testing and analysis conducted pursuant to the rules after July 1, 2021, subject to available funds. Although the cost per district board of education varies and is dependent on a number of factors, including the number of schools operated and the number of drinking water outlets in each school, the Department reimbursed entities covered by this subchapter approximately \$3,280,146 for the initial round of testing conducted during Fiscal Year 2017.

Federal Standards Analysis

The proposed 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.

Jobs Impact

The proposed amendments will not result in the creation or loss of jobs.

Agriculture Industry Impact

The proposed amendments will have no impact on the agricultural industry.

Regulatory Flexibility Analysis

The proposed amendments change reporting, recordkeeping, or other compliance requirements on approved private schools for students with disabilities (APSSDs), private providers of State-funded preschool programs, and nonprofit organizations that operate renaissance schools, all of which could be considered small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. There are approximately 470 entities that fall into the three categories.

The proposed amendments will require the entities to do the following every three years, rather than every six years, as currently required: conduct a plumbing survey, follow specific procedures to collect water samples, have the samples analyzed according to established procedures, and make the test results publicly available. N.J.A.C. 6A:26-12.4 already require the entities to provide: (i) written notification to parents of all students and staff members if any result exceeds the permissible lead action level and to include a description of the measures taken to immediately end use of each drinking water outlet where results exceed the permissible lead action level; (ii) alternate drinking water sources; and (iii) information regarding the health effects of lead. The proposed amendments further require the entities to annually submit to the Department a statement of assurance that testing, notifications, and provision of alternative

drinking water, if necessary, all occurred in accordance with the rules. The rules also provide exceptions from testing under certain circumstances and provides for reimbursement in the same manner as provided to school districts, charter schools, and all other applicable public education agencies.

The need to ensure all students educated with public funds have access to clean drinking water outweighs any burden placed on the entities by the proposed amendments.

The cost per entity varies and is dependent on a number of factors, including the number of schools operated and the number of drinking water outlets in each school. The Department reimbursed entities covered by this subchapter approximately \$3,280,146 for the initial round of testing conducted during Fiscal Year 2017.

Housing Affordability Impact Analysis

The proposed amendments will have an insignificant impact on the affordability of housing in New Jersey. There is an extreme unlikelihood the proposed amendments would evoke a change in the average costs associated with housing because the proposed amendment governs the testing of drinking water in educational facilities for lead.

Smart Growth Development Impact Analysis

The proposed amendments will have an insignificant impact on smart growth. There is an extreme unlikelihood the proposed amendments would evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey because the proposed amendment governs the testing of drinking water in educational facilities for lead.

Racial and Ethnic Community Criminal Justice and Public Safety Impact Statement

There is an extreme unlikelihood that the proposed amendments would have an impact on pretrial detention, sentencing, probation, or parole policies concerning juveniles and adults in the State because the rules proposed for amendment govern the testing of drinking water in educational facilities for lead.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 12. SAFETY REQUIREMENTS FOR SCHOOL FACILITIES

6A:26-12.4 Safe drinking water

(a) – (c) (No change.)

(d) All district boards of education shall conduct lead sampling and analysis, as described in (d)1 and 2 below, in all drinking water outlets to which a student or staff member has, or may have, access, in each school facility, other facility, or temporary facility, as those terms are defined in this chapter. Any district board of education granted an extension of time to conduct initial testing beyond the July 13, 2017, deadline shall complete the initial testing no later than July 13, 2018. District boards of education that completed initial testing prior to July 13, 2017, shall perform follow-up testing in accordance with the schedule in [(f)] **(g)** below.

1. – 3. (No change.)

(e) The district board of education, or its designee, shall complete a review of final laboratory results within 72 hours of receipt. Within 24 hours after the district board of education, or its designee, has reviewed the final laboratory results, the district board of education shall:

1. Make the test results of all water samples publicly available at the school facility **in accordance with (f) below and make the results from the most recent required Statewide testing available** on the district board of education's website; and

2. If any results exceed the permissible lead action level, provide written notification to the parents/guardians of all students attending the facility, facility staff, and the Department.

This **written** notification **shall also be posted on the district board of education's website and** shall include a description of the [measures] **following:**

i. **Measures** taken by the district board of education, or its designee, to immediately end use of each drinking water outlet where water quality exceeds the permissible lead action level[, the];

ii. **Any additional remedial actions taken or planned by the district board of education;**

iii. **The** measures taken to ensure that alternate drinking water has been made available to all students and staff members[.] **at the school(s) where the water outlet(s) is located;** and [information]

iv. **Information** regarding the health effects of lead.

(f) The district board of education's test results of all water samples shall remain publicly available in accordance with the timeline established by the Department of the Treasury in the Records Retention Schedule under record series number 0021-0000, which is available at https://www.nj.gov/treasury/revenue/rms/pdf/m700104_001.pdf.

[(f)] (g) Notwithstanding the results **or date** of any prior testing, all district boards of education shall continue to test drinking water outlets as provided below **in the designated**

Statewide required testing year, which shall be every third school year beginning with the 2021-2022 school year and subsequently occurring in the 2024-2025 school year:

1. [Within six years following the initial testing set forth in (d) above and every six years thereafter] **By no later than June 30 of the designated Statewide required testing year,** all district boards of education shall test all drinking water outlets. Sampling shall be prioritized, such that buildings and facilities that previously had outlets with results above the action level or identified in the plumbing profile as high risk for lead shall be sampled first in accordance with the sampling plan; and

2. (No change.)

(h) If district boards of education test drinking water outlets for lead more frequently than the three-year cycle set forth at (g)1 above, the notification requirements set forth in (e) and (f) above shall apply.

1. District boards of education that test drinking water outlets more frequently in accordance with (h) above shall make the most recent results for each facility available on the district board of education's website.

[(g)] **(i)** All district boards of education shall submit to the Department by June 30 each year a statement of assurance that lead testing was completed in accordance with this section, that notifications were provided consistent with this section, and that alternate drinking water continues to be made available to all students and staff **in accordance with this section.**

[(h)] A district board of education that received an exemption from the Department from initial testing because the district board of education had tested in the previous five years shall make available for public inspection at the school facility and on the district board of education's

website, if applicable, the results of any prior testing and shall conduct testing within six years of the prior testing in accordance with (f) above.]

[(i)] **(j)** District boards of education may request an exemption from the testing requirements set forth in (d) above if they can demonstrate that they do not use any drinking water outlets for consumption or food preparation in any of their facilities. District boards of education seeking an exemption pursuant to this provision shall submit an application to the Department documenting that no drinking water outlets are used in their facilities and the provisions for an alternative source of drinking water. A district board of education that receives an exemption from the Department from testing pursuant to this subsection shall make available for public inspection at the school facility and on the district board of education's website, if applicable, confirmation that the district board of education is exempt from testing. [Within six years of receiving an exemption pursuant to this subsection] **No later than June 30 of each Statewide required testing school year as set forth in (g) above**, a district board of education shall either begin testing procedures in accordance with [(f)] **(g)** above or reapply for an exemption under this subsection.

[(j)] **(k)** All district boards of education [are] **shall be** eligible to be reimbursed for the water supply testing and analysis conducted pursuant to [(d)] **(g)** above after [January 1, 2016] **July 1, 2021, as approved by the Department and subject to available funds. To be eligible to** receive reimbursement, the district board of education shall complete and submit to the Department a reimbursement application on a form, or in a format, supplied by the Department. The Department will make the reimbursement application available on its website. Nonpublic schools that conducted testing in accordance with [(d)] **(g)** above [between January 1, 2016, and July 13, 2017] **after July 1, 2021**, may submit a reimbursement application to the Department,

approval of which is subject to available funds. **A school district that conducts additional testing in a year other than the Statewide required testing school year as set forth in (g) above shall not be eligible for reimbursement.**

(l) A district board of education's failure to comply with any requirement in this section may result in any of the following:

1. The district board of education's disqualification for reimbursement pursuant to (k) above;

2. The Department's initiation of an investigation by the Office of Fiscal Accountability and Compliance; and

3. The Commissioner's withholding of State aid pursuant to N.J.A.C. 6A:2-1.2.