



STATE OF WASHINGTON
WASHINGTON STATE BOARD OF HEALTH

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February 12, 2008

The Honorable Shay Schual-Berke
Washington State House of Representatives
331 John L. O'Brien Building
Post Office Box 40600
Olympia, Washington 98504-0600

Dear Representative Schual-Berke:

I appreciate your willingness to discuss the State Board of Health's efforts to update its school environmental health and safety rule, as well as your offer to facilitate communication between the Board and school districts in the 33rd Legislative District. We have had a difficult time engaging schools in discussions about specific changes to the rule that might better meet their needs, so I look forward to our meeting.

We have touched on my concerns that several issues are being misunderstood, misrepresented, or miscommunicated to the Legislature, and I thought it might be helpful to address some of them in writing.

As you know, the Board spends much of its time adopting and maintaining rules on a variety of public health issues. It has a statutory mandate to adopt rules "controlling public health related to environmental conditions including but not limited to heating, lighting, ventilation, sanitary facilities, cleanliness and space in all types of public facilities including but not limited to ... schools." Our charge is quite clear.

Those rules have been in effect since 1960 and the current rule with minor changes has been in place since 1971. Generally, public health school programs seem to be working. I think this is largely due to the fact that schools do care very deeply about health and safety issues, so they make excellent partners. Not all health jurisdictions have full-scale school health programs, but those that do agree that the key to success is to build collaborative relationships with schools and to support their efforts. You don't see a lot of tension between the schools and local health in Tacoma-Pierce, Spokane, Snohomish, Island, and Thurston—places where there are comprehensive, mature programs in place—about problems and about costs being driven up by these existing programs.

As an aside, Public Health-Seattle & King County does not have a school program and updating the existing law is not likely to change that on its own. The only authority we have to force them to implement a program is to remove the director for failure to enforce a Board rule. To my knowledge, that authority has never been used and probably never will be used for political and legal reasons.

The Board always takes public comments at its meetings around the state, and since the 1990s it has heard more testimony about school environmental health than any other subject. About five years ago, it consulted with school personnel, public health agencies, and others on whether the rule should be updated after more than 30 years. There was extensive agreement that it should be. One of the reasons we opened the rule for revision was because it was both outdated and far too broad. It didn't provide useful guidance to local health or to schools where there are existing programs.

The draft rule is more specific and narrowly defined than the existing one. DOH, however, has been moving toward outcome-based rule making rather than prescriptive rule making for several years. This is a move that has been supported by most stakeholders because it gives them more flexibility in how they can meet the rule's expectations. There is a tradeoff, however. It also means that overzealous enforcement is possible. I don't think we have a history of that in the existing school programs, but schools are still uncomfortable with the latitude in the language. We are trying to be responsive to their concerns, we know the writing could be much clearer, and we are working on language to make it more specific (although I think schools do themselves a disservice by pushing too aggressively toward a highly prescriptive rule). I believe we are not that far apart and if we could get the schools to engage with us in trying to close the gap, we should have no problem getting a rule that everyone can work with by June.

In his e-mail, Superintendent Tom Murphy suggests the Board's rule making process is problematic. I wish I knew what he meant by that. You were not able to hear my presentation at the House Capital Budget Committee, but I believe on many levels this has been an exemplary process. It certainly has been long, inclusive, highly public, participatory, and deliberative. I can provide more details if you wish.

My single greatest source of frustration with the process is that I have been trying to get schools engaged in working out many details and specifics and have failed. I have asked the Puget Sound Schools Coalition (PSSC) repeatedly through its attorneys to suggest language they would be comfortable with for sensitive sections—for example, the definition of “new construction.” I have even invited them to propose a different kind of regulatory and accountability framework. Grace Yuan has said she can't do that because she doesn't know what we are trying to do. I want to hear from them about what they would propose, not their reinterpretation of what DOH might be trying to say. But I can't get her to offer up specific details of what she and her clients would like us to do.

In all my years of rule writing, I have never encountered such a situation. The Washington Restaurant Association had a hand in crafting the language of the Food Code, for example, and I personally spent hours on the phone with Jan Simon, executive director of the Washington State Hotel and Lodging Association considering wording changes the association wanted in the transient accommodations rule.

Instead of offering up specific suggestions or making clear requests, PSSC's strategy appears to be to take broad swipes at the rule, preferably in highly political settings.

Some of their criticisms have become increasingly hyperbolic. The committee hearing, the report and letter presented at the hearing, and your e-mail exchange with Tom Murphy provide some specific examples of the kinds of things that concern me:

- **Conflicts with Other Rules:** Tom Murphy asks how we will deal with conflicts between the rule and existing rules and regulations. Testimony at the hearing also alleges conflicts. We spent months working with other agencies to avoid conflicts. We invited every agency with possible overlapping authority to address the Board in a public meeting. We have asked other agencies to review the draft rules and determine whether there are conflicts with existing rules and regulations. Their opinion is there are none. The Board has stated in a public policy documents shared with the committee that it is opposed to overlapping or redundant elements in the rule. The only two conflicts we have heard mentioned specifically are with Agriculture's pesticide responsibility and OSPI's Washington Sustainable Schools Protocol (WSSP). I have looked at Department of Agriculture's authority on pesticides and am comfortable there is no overlap. I am happy to sit down with any lawyer from the House and review Agriculture's authorities and programs against the proposed rule. If HB 1806 passes, we might want to make the school rule moot on pesticides. We have looked at the WSSP issue and have asked OSPI to review it carefully. OSPI reviewers say they see no conflicts between the draft rule and WSSP. There have been some fairly farfetched interpretations by PSSC that the rule would prohibit windows from opening to provide natural ventilation, but DOH has issued a document affirming that that is not the intent and that we will work to eliminate any ambiguity in the language. If schools want to propose specific "fixes" that would make them more comfortable, I would be happy to entertain them.
- **Capital Costs:** DOH held a long meeting with school personnel to ask them about costs for the rule. They pointed out areas where they thought the second draft was unclear. DOH issued a clarification document. PSSC went away and came back with something completely unexpected—this notion that the rule would require air conditioning or hospital-level filtration for all schools. They wrote it up and took it straight to the legislative committee after I had spoken, so I could not respond. I could have cleared this up with a phone call and saved schools time and money. This was not our intent, this is not our read of the existing language, and I would have happily put that in writing. We look forward to working with them to hammer out language that would make this clear.
- **Cost-Benefit Analysis:** Tom Murphy has asked for a budget proviso that would require a report that outlines the anticipated health benefits and the cost of each proposed rule. This is a significant rule and the kind of analysis he is asking for is required by the Administrative Procedures Act. I believe DOH will also be preparing a small business economic impact statement. We are trying to cost the rule, but instead of being helpful in developing that analysis, PSSC is coming back with estimates that really have nothing to do with the rule.

- **Plan Review Delays:** A letter from Denise Stiffarm, an attorney who works with Grace Yuan, accompanied the capital cost estimates. The letter talks about increased costs from delays associated with local health review of building plans. Plan review has been in place since 1971. OSPI has not allowed release of school construction funds without a local health officer signature since the mid-1970s. All local health jurisdictions do plan review currently. I am aware of no documentation or even anecdotal information that this has resulted in costly delays for the past three decades or more and the claim that this existing system is suddenly going to lead to new delays and a lot of new costs makes no sense.
- **Health Officer Qualifications:** Denise Stiffarm's letter also challenges that notion of a local health officer signing off on design, arguing it is inappropriate because a health officer lacks expertise. Grace Yuan mentioned this in her testimony. All Board of Health rules delegate authority through the local health officer to the appropriate person in a local health agency. The definition of "local health officer" in Title 246 RCW says "or designee." I don't think the SB 5930 language charging Secretary Selecky with various tasks, language I think you may have had a hand in, assumed she would do them all. She was just the person to whom authority and responsibility flowed and with whom accountability resides. Plus, public health is a recognized physician specialty and they are perfectly qualified to deal with issues of vector control, fall prevention, exposure to allergens and toxins, and other issues dealt addressed by the rule.
- **Bearing on Health:** The Board has been very explicit in its charge to DOH that the rule should address only issues with a health impact. There are several things that could have been included to increase student performance and comfort, but we have explicitly avoided those. When Representative Fromhold asked in the hearing about where the rule might have strayed from human health issues, you heard Grace Yuan challenge the notion that controlling zoonotic disease vectors (rodents and insects) in schools had any bearing on health. This in a state where several animal-borne diseases—hantavirus carried by mice, to name just one—are endemic.

I could go on, but I hope you see my point.

When we began this process, I was told that PSSC's agenda would not be to reach agreement on a workable rule, but rather to agitate throughout the process in order to weaken public health's regulatory authority. I don't know if that is true and at some level it doesn't matter. I have an obligation to negotiate in good faith and make every effort to bring stakeholders into the process. I will continue to do that. But given the dubious nature of some of the concerns being raised, the lack of specific and constructive engagement in the rule drafting process, and fact that we were blindsided in a legislative hearing by cost-estimates that have no real bearing on where we are trying to go with the rule, it is easy to become cynical. That is why I am glad that you are willing to encourage direct communication between the districts and the state agencies. I will work very hard to try to make that process successful.

The Board set some goals at the beginning of rule making process and has reaffirmed them since. The rules should:

- Proactively protect children's health
- Be based on 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
- Promote the least burdensome regulatory structure
- Be compatible and consistent with existing related regulations (such as building codes)
- Recognize resource limitations of schools and local health jurisdictions

I think they are still good goals.

Here's my somewhat personal take on this issue. There was an article in the Seattle Times on Sunday about Seattle schools deferring all maintenance. A school a few miles from my office had a rat infestation that could not be controlled for years until they did a remodel. An administrator from a school district near here recently confided in me that there is mold in practically every building in her district. You heard testimony about a school with no heat.

I believe schools often know when there are problems. I also believe they really do care about school health and safety and they want to fix any problems that exist. They are being forced, however, to make difficult choices in the face of scarce resources and are trying to do so with integrity. They feel bad about the things they can't get to and they feel vulnerable. Everybody is asking for a pound of their flesh. They don't like outsiders coming in and pointing out problems they can't do much about because they don't have funding. I am very sympathetic.

All that being said, however, the Board has a clear statutory obligation to protect the health and safety of students. And I think there should be public health standards in place when the government orders our most vulnerable residents into government buildings for the better part of each weekday. Public health oversight of schools in Washington State has existed since the 1960s. We are simply doing our job and updating some very outdated rules. I sincerely hope we can get schools to participate constructively in that process, and I will personally do what I can to make it easy for them.

Sincerely,



Craig McLaughlin
Executive Director