

Testing Water for Lead Contamination Now Mandatory for New York State Schools – Urgent Deadlines for Compliance Apply

On September 6, 2016, Governor Andrew Cuomo signed legislation (S.8158/A.10740) that now requires every school district and board of cooperative educational services (collectively referred to as “school districts” or “districts”) in New York State to test their potable water systems for lead contamination in all occupied school buildings under their control, and to complete several follow-up actions. The same day, the New York State Department of Health (NYSDOH) issued emergency regulations, effective immediately, implementing the new law and setting forth the specific obligations for testing, reporting, and remediating any contamination discovered. NYSDOH’s emergency regulations remain effective for 90 days, and NYSDOH likely will renew these regulations and/or engage in a formal rulemaking process to make them permanent.

Previously, schools in New York were not required to test their water for lead unless they qualified as a “public water system” under state and federal law. In response to this gap in regulatory oversight for water systems serving schools, State lawmakers took action to subject *all* school districts—including those already classified as public water systems—to a host of mandatory monitoring and reporting responsibilities, many with pressing deadlines for completing the necessary activities.

Under the new requirements, all schools must collect first-draw samples from all outlets providing potable water. The first-draw sample must be 250 mL of water collected from a cold water outlet where the water has been motionless in the pipes for at least 8 hours but no more than 18 hours. These sampling specifications follow pre-existing guidance published by the Environmental Protection Agency (EPA) titled “3Ts for Reducing Lead in Drinking Water in Schools,” which NYSDOH stated will serve as the technical guidance for schools implementing the new program.

Schools districts have only a few weeks to complete this initial first-draw sampling. Schools serving students in prekindergarten through grade 5 must collect samples by September 30, 2016, while schools serving students in grades 6 through twelve (and not also serving students pre-K to grade 5) must complete sampling by October 31, 2016.

Even districts that have been proactive to date and already sampled their water systems for lead will have some continuing obligations under these new rules. Their sampling obligation will be satisfied if they have conducted first-draw sampling consistent with these specifications since January 1, 2015. However, all school districts still must submit a report by November 11, 2016 to NYSDOH, the local health department, and the State Education Department (SED) indicating that the new requirements have been satisfied. Other new reporting and notice requirements with similarly pressing deadlines will apply as well.

Unless otherwise directed by NYSDOH, all school districts must repeat this first-draw sampling every five years. Only school buildings that have been deemed “lead-free” under the federal Safe Drinking Water Act (SDWA) are exempt from the first-draw testing requirement, and in that case, schools must post on their websites by October 31, 2016 a list of all buildings determined to be lead-free under the SDWA. A school may also apply to the local health department for a waiver from the testing requirements.

In the event that sampling results exceed 15 parts per billion for lead, the designated lead action level under both current law and the new regulations, then school districts must promptly take several follow-up actions. First, the district must report the test results for the exceedance to the local health department within one business day of receiving the laboratory report. Second, the district must prohibit use of the water outlet at issue, implement a lead remediation plan and continue testing until lead levels are at or below the action level. Third, the district must provide an adequate supply of potable water until remediation is performed. Finally, the district must notify all staff and parents/guardians in writing about the test results within 10 business days of receiving the lab report.

If a district is relying on sampling that occurred before these new rules took effect to satisfy its initial first-draw sampling requirement, and if those sampling results showed any action level exceedance, these obligations will still apply. In such cases, the district must send the required written notification to staff and parents about the test results by September 20, 2016.

Additional reporting and notification requirements now apply as well, whether or not an action level exceedance occurs. Within 10 business days of receiving laboratory reports on testing performed, school districts must report the data to NYSDOH, the local health department, and SED using a NYSDOH electronic reporting system. Furthermore, school districts must make available on their websites the results of all lead testing that they perform and all lead remediation plans they implement within six weeks of receiving the laboratory reports. For any districts relying on lead testing and remediation that occurred before the new regulations took effect, they must make that information available by October 18, 2016.

By December 1, 2016, the Commissioners of NYSDOH and SED will submit a joint report to the Governor and State Legislature on the initial results of water testing in school buildings conducted under the new law, identifying common sources of lead contamination and recommending specific remediation measures to address it. NYSDOH and SED will then publish a biennial report based on the findings of the school district water testing to be sent to the Governor and the Legislature and made available on the NYSDOH and SED websites.

School districts will be eligible to receive State building aid for testing activities undertaken pursuant to this new law, which amends sections 1950 and 3602 of the State Education Law to authorize apportionment of additional building aid to any school district for the testing of potable water systems and installation of effective remedial measures where lead contamination is found. For expenditures to be deemed "approved," they must have been reviewed or approved by a professional with expertise in the field of water quality and remediation and the cost must be incurred before July 1, 2019.

Given the limited timeframes allotted for taking action under the new rules, and given that civil penalties may be assessed for noncompliance, all districts should take care to understand these requirements and implement a program to ensure the necessary attention and follow up steps occur. As initial steps in the process, school districts that have not already completed first-draw sampling in accordance with EPA's 3Ts guidance should immediately begin testing, while school districts that *have* already completed lead sampling should work toward submitting the necessary reports and notices.

If you have any questions about these new requirements or how to proceed, please contact [Kate I. Reid](#), [Michelle R. Billington](#), or any of the attorneys in the [Environmental and Energy](#) or [School Districts](#) Practice Groups.



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