

Responsibilities & Authorities of Local Boards of Health

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Montana's local boards of health are responsible for carrying out the basic public health responsibilities in our communities. If one were to ask what those responsibilities consist of, the traditional public health answer might include the terminology "assessment, policy development, and assurance." What does that mean and how do we do it?

In practice, local boards of health are responsible for assessing health needs in their communities, developing policies and programs to meet these needs, and assuring that the personnel, training, enforcement mechanisms and resources are available to support meeting the community's public health priorities. Several years ago, local, state, and national public health leaders developed a consensus list called the "Ten Essential Public Health Services" needed to carry out these core responsibilities. While this list of essential services answers the "what" part of the question about a local board's responsibilities, it still doesn't answer "how" boards are authorized to carry out these functions.

To understand the specific role of local boards of health in Montana and how public health functions are carried out, we need to examine the powers, authorities and explicit responsibilities conferred through our state statutes and regulations. Local health departments carry out various public health activities under authority delegated by the legislature to local boards and public health officers. The mandated functions related to public health merely categorize a wide range of responsibilities or services that are carried out in varying degrees in each of Montana's counties and municipal governments. [1]* Additionally, discretionary powers offer local board options to address community health priorities. For these reasons, public health departments and public health services, as well as city or county expenditures dedicated to public health, differ significantly throughout the state.

This article will first review the specific statutory grants of authorities and responsibilities delegated to local boards and local health officers in Montana. The Legislature has clearly required the establishment of health boards in every local jurisdiction and outlined very explicit responsibilities of these boards in order to provide for the well being of Montana's citizens.

The second section will give an overview of some of the guidelines, statutory restrictions and judicial limitations that guide local boards in the implementation of their public health responsibilities. Finally, a brief assessment of current activities in Montana regarding our public health laws will be presented.

* Endnotes appear on page 39

Statutory Authorities and Responsibilities:

Montana law requires that each county and first and second class city establish a board of health. (Title 50, Chapter 2, MCA.) By mutual agreement of the applicable governing bodies, city-county or district boards of health representing two or more adjacent counties can be established. [2] The law provides for flexibility in the membership of a local board, but requires a minimum of five persons appointed by either the county or city commissions. In many Montana counties, the board of health consists of the commission members plus two additional appointments; in other instances the board consists entirely of members of the public. By law, the county attorney serves as legal advisor to county or joint city-county boards of health. (50-2-115, MCA.)

Section 50-2-116, MCA sets forth the specific powers and duties of all local boards of health. The board is required to appoint a health officer (either a physician or person with a master's degree in public health or related field) and to employ "necessary qualified staff" to carry out the board's and health officer's public health duties. If the local board fails to appoint a qualified health officer, the Montana Department of Public Health and Human Services (DPHHS) has the authority to make this appointment.

The local board's mandated responsibilities, set forth in sections 50-2-116(1)(f) through (i), MCA, are designed to protect the populace from the spread of communicable diseases. This section of law requires the following:

"Local boards shall ... supervise destruction and removal of all sources of filth that cause disease; guard against the introduction of communicable disease; [and] supervise inspections of public establishments for sanitary conditions ..." The board is also required to adopt regulations for the control and disposal of sewage from private and public buildings that are not regulated by the State Department of Environmental Quality (DEQ).

In order to carry out these mandatory duties, the statutes set forth several discretionary powers that can enable a local board to meet its public health obligations in its jurisdiction. Specifically, under sections 50-2-116 (2)(a) through (h), MCA, local boards may do the following:

- adopt and enforce isolation and quarantine measures to prevent the spread of communicable diseases;[3]
- furnish treatment for persons who have communicable diseases;
- prohibit the use of places that are infected with communicable diseases;
- require the disinfection of places infected with communicable diseases;
- abate nuisances affecting public health or bring action necessary to restrain the violation of public health laws or rules.

Local boards are also vested with rule-making authority and can adopt local regulations in several instances, provided they do not conflict with rules adopted by the state. These local rules can address such things as the control of communicable diseases; removal of filth that might cause disease; heating, ventilation, water supply, and waste disposal in public accommodations; maintenance of sewage treatment systems; regulation of the

practice of tattooing; or local controls that are part of a clean-up plan at state or federal superfund sites. (50-2-116(2)(j) and (k), MCA.)

The statutes pertaining to local boards also recognize the fact that many jurisdictions in the state cannot adequately fund or perform all these obligations individually. Thus, the law clearly allows local boards to accept and spend funds from sources other than the local tax base or to contract with another local board for all or part of local health services.

As noted earlier, local boards are required to appoint a local health officer. The health officer, whether employed full or part-time by the board, or serving on a contract basis, similarly must comply with specific statutory responsibilities and authorities. The functions carried out by the health officer further enable a local board to meet its legal responsibilities. Specifically, section 50-2-118, MCA, requires the local health officer to do the following:

- Make inspections for sanitary conditions;
- As directed by the local board, issue written orders for the “destruction and removal of filth that might cause disease;
- With written approval of the state health department, order buildings or facilities where people congregate closed during epidemics;
- Report communicable diseases to the state health department;
- Establish and maintain quarantine and isolation measures as enacted by the local board of health;
- As prescribed by rules adopted the state health department, supervise the disinfection of places at the expense of the local board when a period of quarantine ends;
- File a complaint with the appropriate court if public health laws or rules are violated;
- Validate state licenses issued by the state health department.

The above responsibilities are mandated duties that the board-appointed local health officer or the health officer’s designee must fulfill. Thus, if the health officer (or designee) does not perform these obligations or is unqualified under the statutory criteria to perform these obligations, a local board must appoint someone who can fulfill these statutory requirements.

While the primary authorities and responsibilities for both local boards and local health officers are contained in Title 50, Chapter 2, there are many other mandatory or discretionary references to local boards and health officers throughout the statutes. This makes it difficult to comprehensively understand all of the local board’s responsibilities. When public health matters are being administered, it is critical that the specific governing statute be examined to determine the extent to which local health entities can or must act.

As an example, the Montana Clean Indoor Act specifically requires local boards of health to supervise and enforce the provisions of the act in buildings and establishments in its jurisdiction. (50-40-108, MCA.) Another local board requirement is to “cooperate with and assist” the state livestock department in matters relating to the control of

disease in livestock. (81-2-106, MCA.) Also, in order for a mayor to exercise extraterritorial powers for “the purpose of enforcing health and quarantine regulations,” both the county commissioners in the affected county and the health board must approve such an exercise of authority. (7-4-4306, MCA.)

A local board may apply for an order from district court to require examination or treatment of a person for tuberculosis provided certain criteria have been met (50-17-105, MCA). Other discretionary authorities afforded local boards include entering into agreements with the Department of Environmental Quality to perform public water supply inspections (75-6-104(12), MCA) and acting as the board of directors for a local water quality district formed pursuant to sections 7-13-4501 through – 4536, MCA.

There are also several instances where local boards are granted quasi-judicial authority to act as an “appeal” board when a decision of the local health officer is challenged or when an exemption from state or local rules is sought. The laws governing licensed facilities such as restaurants, tourist campgrounds and trailer courts, lodging facilities, and swimming pools state explicitly that the local board is the appeal board when the local health officer refuses to validate a license issued by the state. An applicant aggrieved by a decision by the local health officer has 30 days to appeal the decision to the board and the board must then conduct a hearing in accordance with the contested case provisions of the Montana Administrative Procedures Act. [4]

Local boards are also required to adopt standards for considering requests for variances, or exemptions from minimum state standards for sewage disposal on parcels the board is required to review (those that are not regulated by DEQ). These standards must be identical to those adopted by the state Board of Environmental Review (50-2-116(1)(i), MCA.). [5]

With respect to a local board’s authority to adopt regulations for sewage treatment and disposal, the specific statutory references noted above refer to parcels “not regulated” by DEQ. However, the issue of a local board’s authority to regulate sanitation on subdivisions that are regulated by DEQ was litigated and ruled on by the Montana Supreme Court in *Skinner Enterprises, Inc. v. Lewis and Clark County Board of Health* (286 Mont. 256, 950 P.2d 723, 1997). The Court concluded local boards have discretionary statutory authority to regulate sanitation on all subdivisions regardless of whether they are already regulated by DEQ (286 Mont. 276.). To insure better coordination when subdivisions are reviewed by dual agencies, the 2001 Montana Legislature clarified that state-reviewed subdivisions must obtain local approval before a certificate of survey can be filed in the county where the parcel is located. [6]

Finally, while too numerous to mention here, there are other statutory responsibilities or authorities in the statutes pertaining to local health officers. These should be reviewed by the local board’s appointed health officer prior to the health officer undertaking public health activities.

Guidelines and Limitations on the Exercise of Authorities by Local Boards:

The most important limitations on the exercise of authority by a local board of health (or any other government entity) are the constitutional protections afforded all persons in Montana. Historically, public health law struggles to determine the point at which government authority to protect the public must yield to individual rights claims. [7] To pass constitutional review, a careful balancing of individual rights and liberties with the need to protect the public's health must always take place when coercive public health interventions or actions are contemplated. [8]

Both the federal and Montana constitutions delineate fundamental rights and liberties and provide "due process" protections when government action is taken. [9] Thus, even when statutory authority exists for a local board to take action such as implementing quarantine measures or bringing an action to restrain a violation of public health laws or rules, local boards must insure that these measures are carried out in the least restrictive manner possible, provide adequate notice to affected individuals, and provide the right to legal representation and judicial hearing. [10]

Montana's laws governing the control of tuberculosis contain explicit requirements for a hearing and judicial review when a local board applies for an order to require examination or treatment of someone suspected to have been exposed to tuberculosis (50-17-101 through 115, MCA). However, other statutes granting similar powers to local boards are largely silent on these issues. When actions are taken to protect the public, local boards should consult with legal counsel in their counties to insure constitutionally sound procedures are implemented.

Other important guidelines for local boards are contained in Montana's open meeting and public participation laws. Montana is among several states whose constitution and laws unambiguously require that government decision-making processes be conducted openly and with reasonable opportunity for citizens to participate.[11] In normal decision-making processes, such as acting upon variance requests or adopting rules, there are some basic procedural elements that a local board must meet:

- The meeting must be open to the public (2-3-203, MCA).
- Advance notice of any matters that the board will hear or act upon must be provided to the public. (2-3-103, MCA). These items should be clearly identified on the meeting agenda.
- There must be procedures to allow the public a reasonable opportunity to participate prior to the board making a decision of "significant interest to the public" (2-3-103 and 111, MCA).
- Minutes must be kept of all public meetings and made available for public inspection (2-3-212, MCA). [12]

Exceptions can occur, however, because of the unique nature of a local board's responsibilities involving matters such as communicable disease reports or specific health care information reported to the health officer. Conflicting situations can occur that may require a balancing of an individual's constitutional privacy rights and confidentiality

protections with the open meeting requirements. It is not atypical for a local board to have to determine at which point the public's right to know is outweighed by an individual's right to privacy as enumerated in Section 10 of Montana's Constitution. Furthermore, all local public health officials as well as members of the local board are subject to the confidentiality provisions contained in Montana's "Health Care Information Act." (Title 50, Chapter 16, MCA). Moreover, recent federal requirements adopted pursuant to the Health Insurance Portability and Accountability Act (HIPAA) hold health officials and health care providers to very high standards of privacy and confidentiality.[13] A prudent course of action is to seek legal counsel if a board needs to discuss or act upon any information that might be considered "confidential health care information."

The most specific statutory limitations and restrictions on a local board's authorities are in the realm of rule making. First, the board is limited to adopting rules where there is express legislative authority. Rules or regulations cannot be enacted that go beyond the scope provided for in the legislative directive. Also, the legislative grants of authority to adopt rules specify that the local rules must "not conflict with rules adopted by the [state]." [14] Thus, the local board's rules cannot be less stringent than comparable state rules and cannot contradict the purpose of the rules adopted by the state. Furthermore, in 1995, the Legislature enacted Sec. 50-2-130, MCA, mandating that local boards must meet strict criteria in order to adopt rules pertaining to the control of sewage if they are "more stringent than the comparable state regulations or guidelines that address the same circumstances." The criteria necessary to justify a more stringent rule include written findings by the local board, based on evidence in the record, that the more stringent requirement will protect public health or the environment; is achievable under current technology and can mitigate harm to the public's health; and is supported by peer-reviewed scientific studies. The board must also consider the costs to the regulated community of meeting the proposed rules. [15]

Is There Need for Reform?

In the aftermath of September 11 and the subsequent anthrax attacks, efforts have been made to review state and federal statutes to insure that public health laws will permit health officials to effectively contain an epidemic caused by an attack of bioterrorism. However, as seen recently with the SARS epidemic, significant threats to the public's health and welfare can result from highly infectious agents that are not the product of intentional actions. Because many public health statutes were enacted in the early 1900's when public health problems focused heavily on sanitation issues, health officials are properly worried that laws may be outdated or inadequate to address current public health threats.

Montana is one of several states undertaking a comprehensive review of public health laws, not only to assess the adequacy of our laws to react to public health emergencies, but to determine if sufficient authority exists to carry out the essential services necessary to protect public health. No one is advocating wholesale revision of Montana's statutes. This is both politically unrealistic and impractical. However, legitimate questions exist regarding some of the outdated language in our statutes and the fact that public health

authorities are scattered throughout the codes, making it difficult for public health professionals as well as local boards to comprehensively understand their responsibilities and powers. For instance, do local boards understand what the authority to “abate nuisances affecting public health” or to adopt rules “for the removal of filth that might cause disease” really means? Is it clear to those charged with protecting the public what actions are allowed or the extent to which a board can act under these legislative directives? Do our laws provide adequate powers to address new and emerging health problems in our communities?

The review of Montana’s statutes will focus on whether the existing powers as well as limitations on authorities are clear, understandable and sufficient to allow local boards and health officials to appropriately meet public health obligations. [16] If necessary, modifications or revisions will be presented for legislative consideration in future sessions. It is only with a clear and timely statutory framework that local boards will be able to function effectively and fulfill the essential services critical to protecting the public’s health.