



INFORMATION SHEET

Idaho Open Meeting Act and Governor's Stage 2 Stay Healthy Order

The Governor's Office has received questions about whether any changes were made to Idaho's Open Meeting Acts ("OMA") by the [Governor's Stage 2 Stay Healthy Order](#) that went into effect on November 14, 2020. The questions most often relate to whether the 10-person limit on gatherings applies to public meetings and to public hearings.

The following is intended to provide information for consideration. It should not be treated or relied upon as binding law or legal advice. Each governing body of a public entity should confer with its own legal counsel and make an independent determination of how to comply with the letter and spirit of the OMA to ensure openness and transparency and protect the public and staff and board or commission members of the political subdivision during the COVID-19 pandemic.

- The Stay Healthy Order's 10-person limit applies to public meetings. The governing body of a public entity, however, retain the discretion to allow more than 10 people to attend a meeting if it, for example, finds it necessary to comply with the Open Meetings Act or to allow for political expression. The Stay Healthy Order does not prohibit gatherings for political expression purposes at an appropriate time, place and manner.
- The Stay Healthy Order does not alter the requirements of the Idaho Open Meetings Act. The Order does require compliance with the Physical Distancing and Sanitation Requirements found in Section 3 of the Order.
- The Stay Healthy Order also does not limit the existing authority of a governing body such as a local government, health district, school board or other political subdivisions that fall under the requirements of the OMA to make rules or regulations to protect the public health and to ensure the orderly conduct of public meetings. See the attached AG's Opinion and the Idaho Open Meeting Law Manual, p. 12-13, question 18 (available at: <https://www.ag.idaho.gov/content/uploads/2018/04/OpenMeeting.pdf>).
- Taken together, governing bodies appear to have the existing authority, for example, to require distancing and/or limit the number of people attending a public meeting in person, so long as a physical location for the meeting is provided with at least one member of the governing body or the director or chief administrative officer physically present. See the Idaho Open Meeting Law Manual, p. 15-16, question 25. In that scenario, the political subdivision should ensure that the meeting is available remotely to the public—i.e. by phone or online.
- Most importantly, careful consideration and planning should be made to ensure that the public continues to have access to observe all public meetings and that the OMA's goals of transparency and openness are upheld. Similarly, it is important to ensure that the notice(s) for the public meeting includes an explanation of how the public can attend remotely and any limits or requirements on attendance.
- Finally, the following are suggestions a governing body can consider to facilitate public hearings that call for public comment while also ensuring a safe and orderly hearing: hold the hearing in a larger facility to allow greater spacing; facilitate giving of testimony by telephone or via an online service such as Zoom; if more people want to attend and testify than permitted by capacity limits, allow those not in the hearing room to come in to testify at the appropriate time; and emphasize the ability to provide written testimony. In all circumstances, care should be taken to ensure the public can observe the hearing and testify, and to ensure that any applicable laws, including laws requiring testimony to occur in-person, are followed.



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

July 22, 2020

TRANSMITTED VIA EMAIL

Brian Wonderlich
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Office of the Governor
State of Idaho
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Re: Request for AG analysis – Our File No. 20-70182

Dear Mr. Wonderlich:

This letter is in response to your recent inquiry of this office regarding the scope of local authorities with regard to their ability under Idaho law to craft pandemic responses within their areas of jurisdiction. Specifically, you asked about recent inquiries you've received from local authorities regarding the authority cities, public health districts, and/or school districts have to adopt those measures deemed necessary to preserve and protect the public health, and whether those measures have the force of law. As explained in greater detail below, Idaho Code provides express grants of authority to cities, public health districts, and school districts to adopt all public health measures the entity deems necessary and those measures have the force of law.

Public Health Districts Are Broadly Empowered to Protect Public Health

Under Idaho law, the state has been divided into 7 public health districts. Idaho Code § 39-408. Each of these public health districts has the statutorily designated legal authority to both issue health measures and orders of quarantine. There is no question that the legislature has provided ample authority for districts to address the pandemic within their jurisdictions. Under Idaho Code § 39-414(2), health districts have the authority to:

- (2) To do all things required for the preservation and protection of the public health and preventive health, and such other things delegated by the director of the state

department of health and welfare or the director of the department of environmental quality and this shall be authority for the director(s) to so delegate.

Recognizing that public health districts are authorized “to do all things required for the preservation and protection of the public health and preventative health...,” the districts have the ability to adopt measures designed to both prevent and address the pandemic. For example, the Central and Eastern Idaho Public Health Districts have taken actions recently pursuant to this authority.

This authority is reinforced by Idaho Code § 39-415¹ which provides Health Districts with equivalent authority to that of the Director of the Department of Health & Welfare to issue orders of quarantine:

QUARANTINE. The district board shall have the same authority, responsibility, powers, and duties in relation to the right of quarantine within the public health district as does the state.

Public health districts thus have independent authority to adopt measures necessary for the preservation and protection of public and preventative health along with all of the quarantine authority assigned to the state. The state’s quarantine authority is found in Idaho Code § 56-1003(7):

The director, under rules adopted by the board of health and welfare, shall have the power to impose and enforce orders of isolation and quarantine to protect the public from the spread of infectious or communicable diseases or from contamination from chemical or biological agents, whether naturally occurring or propagated by criminal or terrorist act.

(a) An order of isolation or quarantine issued pursuant to this section shall be a final agency action for purposes of judicial review. However, this shall not prevent the director from reconsidering, amending or withdrawing the order. Judicial review of orders of isolation or quarantine shall be de novo. The court may affirm, reverse or modify the order and shall affirm the order if it appears by a preponderance of the evidence that the order is reasonably necessary to protect the public from a substantial and immediate danger of the spread of an infectious or communicable disease or from contamination by a chemical or biological agent.

(b) If the director has reasonable cause to believe a chemical or biological agent has been released in an identifiable place, including a building or structure, an order of quarantine may be imposed to prevent the movement of persons into or out of

¹ This provision is curious because it predates the quarantine authority contained in Idaho Code § 56-1003(7) which was adopted in 2006. Section 39-415 was adopted in 1970, which undermines any argument that the inherent powers of the state do not include the power to quarantine as a basic element of the state’s police powers.

that place, for a limited period of time, for the purpose of determining whether a person or persons at that place have been contaminated with a chemical or biological agent which may create a substantial and immediate danger to the public.

(c) Any person who violates an order of isolation or quarantine shall be guilty of a misdemeanor.

Based upon Idaho Code § 39-415, it appears that the entirety of this provision, along with the rules promulgated by the Board are incorporated into the authority of the public health districts. This legislative delegation of authority combined with Idaho Code § 39-414(2)'s direction that local public health districts "do all things required for the preservation and protection of the public health and preventative health," operate to authorize local public health districts to take any necessary measures to address the COVID19 pandemic. Those measures properly adopted have the force of law.

Cities Have Complete Authority to Adopt Any Necessary Public Health Ordinances

Idaho's Constitution also provides city governments with a broad grant of police power. Article XII, § 2 provides:

LOCAL POLICE REGULATIONS AUTHORIZED. Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

This provision provides cities with the authority to enact provisions designed to protect the health, safety, and welfare of their citizens, unless the legislature has proscribed such regulations. In this instance, the Idaho Legislature has specifically authorized cities to address situations such as the current pandemic.

Idaho Code § 50-304 directs:

PRESERVATION OF PUBLIC HEALTH. Cities may establish a board of health and prescribe its powers and duties; pass all ordinances and make all regulations necessary to preserve the public health; prevent the introduction of contagious diseases into the city; make quarantine laws for that purpose and enforce the same within five (5) miles of the city.

This grant of authority is both express and broad. In particular, the direction to pass all ordinances necessary to preserve the public health along with prevent the introduction of contagious diseases within the city enables Idaho cities to directly address COVID-19 before and after it enters a city. In this regard, of all the units of government within Idaho, cities likely enjoy the clearest and most express grant of authority to address COVID-19.

Mayors have the authority to enforce these measures. Idaho Code § 50-606 provides:

POLICE POWERS OF MAYOR. The mayor shall have such jurisdiction as may be vested in him by ordinance over all places within five (5) miles of the corporate limits of the city, for the enforcement of any health or quarantine ordinance and regulation thereof, and shall have jurisdiction in all matters vested in him by ordinance, except taxation, within one (1) mile of the corporate limits of said city and over such properties as may be owned by the city without the corporate limits.

When the city council and mayor's authority are combined, the authority of cities to respond to both the threat and the presence of a pandemic such as COVID-19 is complete.

School Districts Have Authority To Protect The Health of Students and Teachers.

School districts have the necessary authority to implement health safety measures within their school districts. Specifically, under Idaho Code § 33-512, the following paragraphs would permit such an order:

- (4) To protect the morals and health of the pupils;
- (7) To exclude from school, pupils with contagious or infectious diseases who are diagnosed or suspected as having a contagious or infectious disease or those who are not immune and have been exposed to a contagious or infectious disease; and to close school on order of the state board of health and welfare or local health authorities;
- (11) To prohibit entrance to each schoolhouse or school grounds, to prohibit loitering in schoolhouses or on school grounds and to provide for the removal from each schoolhouse or school grounds of any individual or individuals who disrupt the educational processes or whose presence is detrimental to the morals, health, safety, academic learning or discipline of the pupils. A person who disrupts the educational process or whose presence is detrimental to the morals, health, safety, academic learning or discipline of the pupils or who loiters in schoolhouses or on school grounds, is guilty of a misdemeanor;
- (13) To govern the school district in compliance with state law and rules of the state board of education;
- (16) To maintain a safe environment for students by developing a system that cross-checks all contractors or other persons who have irregular contact with students against the statewide sex offender registry, by developing a school safety plan for each school and by meeting annually with emergency first responders to update the plans and discuss emergency exercises and operations;

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The authority delegated to school districts by the legislature includes the authority when necessary to enforce a school district's orders in response to a pandemic situation. Public charter schools are authorized to exercise this same authority under Idaho Code § 33-5210(3).

In conclusion, each unit of local government has broad authority to address the pandemic within their areas of jurisdiction. This means that public health districts, cities, and school districts have been delegated all legally necessary authority by the legislature to implement measures to address the threat and presence of a pandemic within their jurisdictions. This authority exists without the need for any delegation of authority from the Governor or the Director of the Idaho Department of Health and Welfare.

I hope you find this analysis helpful.

Sincerely,

A handwritten signature in blue ink, appearing to read 'B. Kane', is written over a light gray rectangular background.

BRIAN KANE
Assistant Chief Deputy

BK:kw