



State of West Virginia  
Office of the Attorney General

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The Honorable Daniel M. James  
Morgan County Prosecuting Attorney  
77 Fairfax Street, Suite 301  
Berkeley Springs, WV 25411

The Honorable Catie Wilkes Delligatti  
Berkeley County Prosecuting Attorney  
380 West South Street, Suite 1100  
Martinsburg, WV 25401

Dear Prosecutors James and Delligatti:

You have asked for an Opinion of the Attorney General about whether a letter from your local health officer constitutes a “rule” or an “order.” This Opinion is being issued pursuant to West Virginia Code Section 5-3-2, which provides that the Attorney General “may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office.” To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Office of the Attorney General.

In your request, you explain that the Morgan-Berkeley County Health Officer issued letters on August 9 and 11, 2021, which stated that the combined Morgan-Berkeley County Health Department “will require universal mask use in schools for all individuals” under certain circumstances. You indicated that the Officer believes these letters constitute an “order,” and that “he has the authority to enter such an order pursuant to W. Va. Code §§ 16-3-1 and 16-3-2.” You also note that members of the community have questioned whether the letters should be treated as a “rule” rather than an “order,” and thus subject to approval or disapproval by the county commission “pursuant to W. Va. Code § 16-2-11(3)(H).”

Your request thus turns on the legal distinction between a local health “rule,” subject to approval or disapproval by a county commission, and a local health “order.” Nevertheless, the circumstances you have laid out present a threshold issue about whether a local health officer has authority to issue rules or orders in the first place:

*Does a local health officer have the authority to issue rules or orders unilaterally, or must rules and orders be issued by local boards of health?*

We conclude that local health officials are not empowered to promulgate rules or orders on their own. Accordingly, we conclude that the August 9 and 11 letters are neither a rule nor an order because the Officer lacked authority to issue binding, unilateral directives.

### *Discussion*

Your questions address two different types of local health directives. *First*, local health “rules” “that are necessary and proper for the protection of the general health of the service area and the prevention of the introduction, propagation, and spread of disease” are “[a]dopt[ed] and promulgate[d]” by “[e]ach local board of health.” W. Va. Code § 16-2-11(b)(3)(A). Such rules must be “consistent with state public health laws and the rules of the West Virginia State Department of Health and Human Resources,” and must be “approved, disapproved, or amended and approved by the county commission” or other appointing entity that oversees the promulgating board. *Id.* § 16-2-11(b)(3)(A), (C)-(E). *Second*, a local health “order” is “made by [a local] board” pursuant to the “[p]owers of county and municipal boards of health to establish quarantine.” W. Va. Code § 16-3-2. Such a quarantine may be lifted by the state director of health if he or she finds it is not necessary. W. Va. Code §§ 16-1-2, 16-3-2.

Critically, both rules and orders are issued by a local *board of health*, not a local *health officer*. W. Va. Code §§ 16-2-11(b), 16-3-2. Indeed, a local health officer is charged with “*administer[ing]* . . . the rules and orders of the local board,” and may not even serve as a voting member of the board to which he or she reports. *Id.* § 16-2-13(a), (b)(1) (emphasis added). More generally, none of the powers that the Code provides “may be delegated” to a “local health officer” include authorizing these officers to issue their own “rules” or “orders.” *See id.*

The distinction between the local board and executive officer reflects the “general rule inherent in the American constitutional system” of separating legislative, executive, and judicial powers. *State ex rel. State Bldg. Comm’n v. Bailey*, 151 W. Va. 79, 85, 150 S.E.2d 449, 453 (1966). “Rule-making” is a legislative power that only “comes under the executive department’s bailiwick upon the delegation” of such power from the corresponding legislative body. *State ex rel. Meadows v. Hechler*, 195 W. Va. 11, 15, 462 S.E.2d 586, 590 (1995). And because local boards of health are not authorized to make such delegations, it would be inconsistent with this framework to allow “the executive officer” tasked with “*administer[ing]* . . . rules and orders,” W. Va. Code § 16-2-13(a), to also enact new rules and orders unilaterally. Further, the Legislature has recently *strengthened* this distinction by increasing oversight of boards when exercising their rulemaking power. *See* 2021 W. Va. Acts c. 213 (enacting requirement that local board of health rules be approved by municipal or county governing bodies). This new system of legislative oversight mirrors protections that have long existed at the state level to ensure accountability for agencies tasked with delegated rulemaking powers. *See* W. Va. Code § 29A-3-12 (providing for legislative approval of agency regulations). It is unlikely that the Legislature would have intended the county-level system to include a “backdoor” through which a board’s executive officer could implement rules independent from this oversight.



Because nothing in the August 9 or 11 letters suggests that they were issued by the Morgan-Berkeley Board of Health, we therefore conclude that they do not satisfy the statutory requirements to be either a rule or an order. We note that this conclusion does not depend on the subject or substance of the letters themselves, but was reached solely because of the identity of the issuer. Nor does this Opinion address whether a directive issued by a local board of health addressing this subject would constitute a rule or order. Evaluating such a directive would depend on several case-specific factors, including whether the board had declared a “quarantine” pursuant to Section 16-3-2.

More broadly, we are not aware of any other statute that would give these letters binding legal effect. Although the Governor’s Executive Order 22-20 previously gave your local health department the authority to “establish and enforce” certain protocols related to the COVID-19 pandemic, this Order was terminated on April 20, 2021. *See* State of West Virginia Executive Department, Executive Order 12-21 at 2-3 (Apr. 19, 2021), *available at* <https://governor.wv.gov/Documents/2021%20Executive%20Orders/EO-12-21-April-19-2021.pdf>. Similarly, it is true that a local health officer has power in some circumstances to “implement the prevention and control methods specified by the protocols in the West Virginia Reportable Diseases Protocol Manual . . . or developed in consultation with the Commissioner [of the Bureau for Public Health of the West Virginia Department of Health and Human Resources].” W. Va. Code St. R. §§ 64-7-2.10, 16.4.a. The facts you describe, however, do not suggest that this power has been invoked here: The local health officer’s letters did not refer to any protocol in that manual, nor did they allude to any consultations between the local health officer and the Commissioner of the Bureau for Public Health.

The COVID-19 pandemic has created numerous challenges for public officials at all levels of government, especially those tasked with keeping our children safe. It is important to take reasonable precautions in this regard, but even well-intentioned policies must be issued in lawful ways. Supervisory oversight and other legal constraints preventing unilateral bureaucratic action maintain political accountability—a particularly important consideration when enacting policies during unusual and fast-changing circumstances.

Sincerely,



Patrick Morrissey  
Attorney General

Lindsay See  
Solicitor General

cc: Anthony Delligatti, Berkeley County Legal Director