SB 253
Rules Advisory Committee meeting minutes
December 17, 2019
1:00 p.m. – 2:30 p.m.

Members present: Morgan Cowling (CLHO), Andy Smith (AOC), Shannon O’Fallon (DOJ), Commissioner Tim Freeman (Douglas County), Nicolas Powers (Winding Waters Community Health Center), Mike Paul (Columbia County), Carrie Brogoitti (Union County), John Huttl (Curry County, joined late)

Members absent: Dr. Jeanne Savage (Marion County), Pete Runnels (Harney County)

Oregon Health Authority (OHA) staff: Danna Drum, Krasimir Karamfilov

Welcome and overview of rulemaking process

Ms. Drum introduced the meeting. She asked the committee members to introduce themselves. After the introductions, she informed the committee that Dr. Jeanne Savage and County Judge Pete Runnels could not attend the meeting.

Ms. Drum noted that Senate Bill 253 passed during the 2019 legislative session. It required rulemaking by the Oregon Health Authority. The plan for the Rules Advisory Committee is to meet once in December 2019 and once in January 2020 to review and provide input on the draft proposed rules. In January, the committee will look at the fiscal impact statement and the statement of need that are submitted with the proposed rules to the Secretary of State.

Ms. Drum explained that in February 2020, the state has a short legislative session and it is OHA practice to not do rulemaking during that time unless there is an emergency. In March, at the conclusion of the legislative session, OHA will file notice of the proposed rulemaking with the Secretary of State. In April, OHA will hold a public hearing and there will be a public comment period on the proposed rules. In May, OHA will respond to any public hearing testimony and comments submitted during the public comment period. The final rules will be filed with the Secretary of State’s office later in May. The rules will become effective on June 1, 2020.

Overview of related statutes

Ms. Drum remarked that the related statutes are in ORS.431 and they describe when a transfer of local public health authority (LPHA) can occur. It also describes what happens functionally when LPHA responsibilities are transferred to OHA. This has already occurred once. Wallowa County transferred their LPHA responsibilities to OHA a year and a half ago. SB 253 mainly added additional provisions in ORS.431 that were not there originally.
Ms. Drum reviewed the conditions for transfer, which are spelled out explicitly in Oregon statute. If OHA doesn’t receive enough state money equal or exceeding the estimate OHA submits to legislature, money that is needed to fully implement the public health modernization foundational programs and capabilities, a governing body of a LPHA can transfer LPHA responsibilities to the state (i.e., OHA). This condition was met both in the last and the current biennium. In the 2017-2019 biennium, OHA informed the legislative fiscal office that $48 million was needed for moving forward the implementation of public health modernization. The legislature allocated in its budget $15.6 million. The threshold of need was not met and, at this point, any LPHA in the state can transfer their LPHA responsibilities.

Ms. Drum explained that if there is going to be a transfer, the governing body of the LPHA has to pass a resolution or ordinance and the transfer cannot take effect until 180 days after adoption unless OHA agrees to an earlier date. OHA’s agreement to an earlier date was added to SB 253 because of the situation with Wallowa County.

Mr. Smith explained that the trigger that allowed a county to do this was governed by preexisting statute, which wasn’t changed by SB 253. He asked if this was an annual or biennial practice.

Ms. Drum answered that it was biennial. She clarified that a county can request a transfer at any time. The threshold for whether a transfer is allowable is based on the last time OHA submitted a funding number to the Legislature.

Mr. Smith remarked that if $48 million would be full funding, that number probably wouldn’t go down. There is a gap in the funding now, which won’t be fixed in the interim. It is quite likely that the situation will be the same in the next session.

Ms. Drum stated that when there was a transfer, all public health responsibilities were transferred. The governing body cannot pick and choose responsibilities to keep. From OHA’s perspective, the governing body is choosing to no longer be responsible for public health in their jurisdiction or to be part of the public health system.

Ms. Drum added that the Department of Justice (DOJ) has reviewed OHA’s responsibilities in a transfer. OHA’s responsibilities include monitoring communicable diseases and controlling outbreaks, enforcing the Indoor Clean Air Act, ensuring access to safe drinking water, ensuring access to WIC services, licensing and inspecting food, pool, and lodging facilities. Any other public health work within a jurisdiction that has transferred LPHA responsibilities is covered at the discretion of OHA. OHA looks at available resources, entities in the area that can do the work, and the epidemiological needs, among other factors. OHA doesn’t set up a health department in a jurisdiction that has transferred its responsibilities. In the case of Wallowa County, OHA handles these functions remotely.
Mr. Smith asked if the OHA responsibilities were in the statute or they were an interpretation of the statute.

Ms. Drum answered that they were pulled from the statute and interpretation of statute. The responsibilities are in various places in the Oregon statutes. In terms of the changes in SB 253, the bill provides language related to transferring LPHA responsibilities back to a jurisdiction that previously transferred responsibilities to OHA. Should a county board of commissioners adopt an ordinance or a resolution to transfer their local public health responsibilities to the state and, if at some point, they want those responsibilities back, there wasn’t anything in the statute describing how that would happen. It was vaguely addressed in the Oregon Administrative Rule.

Ms. Drum noted that the statute now stated that the LPHA governing body must provide rationale for the request to transfer back. It also specifies that, generally, a transfer back cannot occur for at least four years after the transfer date. There is a provision in the statute for potentially transferring the responsibilities back to the jurisdiction at an earlier date. For that to happen, OHA has to agree to an earlier date and there are criteria to be met. However, the bill doesn’t specify the criteria. One of the jobs of the rules advisory committee is to look at potential criteria as it reviews the draft proposed rules. The statute changes gave OHA rule making authority to establish criteria for an early transfer. As long as the request meets certain requirements, after four years of a transfer, the local jurisdiction could request a transfer back of the responsibilities, and the transfer would happen.

Mr. Smith clarified that the statute was clear that a county could request a transfer back before the four years and OHA could make a determination about whether or not to agree to an early transfer back. However, a county has a full option to regain responsibilities after four years.

Ms. Drum pointed out that based on the experience with Wallowa County, the bill now specified that OHA and the LPHA governing body must enter into a written agreement describing schedule and other information to effectuate the transfer back. The agreement enables OHA and the LPHA to be clear about the expectations and responsibilities during the transfer.

Ms. Cowling requested clarification about the role of the rules advisory committee. Her understanding was that the role was to define the criteria for the transfer back before four years.

Ms. Drum answered that the work was about the transfer back. The bulk of the work is around the criteria, as there is not much guidance around that in the statute. She added that one thing for the committee to keep in mind when going over the proposed rules was OHA’s emphasis on health equity and alleviating health disparities. Expressed as a question: What are the positive and negative impacts of these rules on communities, especially communities that have traditionally experienced health disparities?
Discuss proposed rule language

Ms. Drum explained that the committee would be looking at the last two pages of the proposed rules, starting at rule 333-014-0590 that deals with the request to transfer local public health authority. The committee will start at rule (7). Rules (7.a), (7.b), and (7.c) define what the request must include.

Commissioner Freeman remarked that in requiring a resolution or an ordinance to opt out, why would OHA only require a letter to opt back in. In most counties, before two or more members would sign a letter as a majority, they would have a public meeting and approve it. The current language sets up a possibility for a county to have two of its board members sign a letter without having formal actions. The language may specify the need for an ordinance or resolution to avoid having commissioners unintentionally committing a meeting law violation by two of them signing a letter and creating a quorum for an action.

Ms. O’Fallon asked if the county had to pass a resolution authorizing someone to request the transfer back.

Commissioner Freeman stated that there should be a public process for asking it back. It could be a simple motion and a second at a public meeting. We should be careful to not set up counties to mistakenly think that the state is saying that two members could sign a letter and it becomes a request to have it back. In a county that has only three commissioners, technically that is a meeting law violation.

Ms. O’Fallon clarified that the language was not intended for one commissioner to request the transfer back. Everybody should be on board.

Ms. Cowling noted that there was clause that said that the board had to rescind the previous contracts or agreements in place.

Ms. Drum answered that that clause was at the end.

Ms. Cowling asked if there would be a conflict of ordinances. If there was an ordinance that said to give back the responsibilities when there was already an ordinance to transfer.

Ms. O’Fallon answered that that’s why it should be a resolution that said that the county was requesting the transfer back.

Mr. Smith added that the ordinance would be still on the books, and when everything was done, the board would repeal it.

Ms. Drum read rule 7.c., which concerned the transfer of responsibilities from OHA to the LPHA sooner than four years. Rule 7.c.A. asked for a financing plan for fulfilling LPHA responsibilities.
Often, when these conversations come up, they are driven, at least initially, by budget issues and limited resources.

Commissioner Freeman reminded the committee that counties operate on annual budgets. No set of county commissioners can obligate future county commissioners or budget committees to expenditures. A plan is plan, but if a county gives OHA a four-year plan, the current board will obligate only for the current year.

Ms. Drum stated that the OHA team understands that. If Commissioner Freeman had any language recommendations, he could send them to the OHA team. It is understood that how the work is paid for changes with each budget cycle.

Ms. Cowling pointed out that if there was an election and the new commissioners wanted the transfer back after three years, it is unclear what the commissioners would plan around. How would they figure out the responsibilities? How would they develop and submit a plan, if they weren’t there when there were local public health department services? There needn’t be a detailed description in the rules, but, along with the request, is there a template or a checklist that OHA can do that lists all responsibilities and staffing that the LPHA has to have available?

Ms. Drum answered that, most likely, if a governing body was thinking about a transfer back, it would be in some sort of conversation with OHA prior to taking an action. Typically, Ms. Drum gets a phone call. There has not been a request to transfer back yet, but at the reach-out point a variety of things are discussed. The conversation about the responsibilities is tailored to that specific community. She was unsure if OHA wanted to be in a position of having to upfront, as a part of rules, to provide a set of tools in case the transfer happens.

Ms. O’Fallon added that it was hard to imagine that a county would request the transfer back without having some understanding about what that meant or without talking to other counties.

Mr. Smith interjected that it certainly could happen.

Ms. O’Fallon continued that OHA could provide a draft of the financial assistance agreement with all program elements.

Ms. Powers remarked that one option would be to refer to that requirement at least including the responsibilities outlined on page 3 of the bill under LPHA statutory responsibilities. The county should at least respond to those as a basic checklist.

Mr. Smith stated that, because the statute would still exist, the key point was that when a county got it back, it got all of it back. It’s not pieces of it back or a hybrid situation.

Ms. O’Fallon pointed out that not all counties did all program elements (PEs).
Mr. Smith noted that whatever the underlying statute required for responsibilities to be a public health authority, when the county came back, it was the same set of requirements. Nothing says that explicitly in the rules. It says “at your discretion to happen early,” but this would also apply if it was after four years. When the county gets them back, it gets them back. It’s the same set of responsibilities.

Ms. Drum suggested to reference 333-014-0550, which would give the framework that could be responded to.

Ms. Cowling added that the rules can say that the county has started this process and here’s the administrative rule that outlines what the LPHA has to have for financial and staffing.

Mr. Paul asked about the responsibilities listed in the rule. Ms. Drum had mentioned earlier WIC, but it was not in the rule. Are they the same responsibilities?

Ms. Drum answered that it was not a 1-to-1. WIC is on the list for OHA, if there was a transfer, because OHA has a responsibility in the statute to have a statewide WIC program. WIC is not one of those services that a LPHA has to directly deliver. That’s why it is on the slideshow presentation for OHA, but not in the rule for LPHAs.

Commissioner Freeman asked for clarification of rule 7.c.D., which was about locations for public health services. He asked whether what was asked were the initial locations where public health services would be provided.

Ms. Drum answered that this rule asked for the locations on the day the transfer to the local jurisdiction was effective.

Ms. O’Fallon remarked that this was a plan. It’s not going to be the case where the state would say, “We think you have a good plan. We are transferring authority back and you have to comply with your plan.” They aren’t requirements. It’s so the state knows that the county has the capacity and understands what it is taking on, so we don’t end up with the transfer right back to OHA.

Ms. Drum added that when the paperwork is submitted, there may be clarifying conversations during which it could be discovered that there was a better way to do the transfer than was submitted initially. There would likely be a lot of back-and-forth about programs that haven’t been in place.

Ms. Drum read rule 7.c.E, which was about a detailed communication plan that would describe how the LPHA would communicate to the residents of the state about the transfer.
Ms. Cowling stated that the word *detailed* in rule 7.c.E. was setting an expectation that was not defined and a little subjective. The word *detailed* is not necessary.

Ms. Drum asked the committee members if any additional criteria should be included in rule 7.c.

Mr. Powers shared that a point that stood out for him was the detailed communication plan. He proposed a new rule, 7.c.F., that should be about a detailed communication plan with other providers in the jurisdiction. Because Winding Waters Community Health Center is one of the key health care providers in Wallowa County, if the county were to restart services, that would be something WWCHC would need to help communicate to patients and coordinate with the county. It would be really important to get on their radar early and for them to understand that they need to be doing that work, if they were to take that authority back.

Ms. O’Fallon asked if it would make more sense to refer to primary care providers, as a way to narrow the field a little bit.

Mr. Powers answered that it would make sense. There aren’t many other kinds of providers in the area. In addition to primary care, it would require coordinating with any local hospitals that may have taken some of the responsibilities.

Ms. Drum noted that the social service providers could be included in that group, because of all the referrals that happen. She agreed that Mr. Powers’ suggestion was an important piece to add.

Ms. Cowling remarked that there should be communication with community partners and providers. On the list of responsibilities, the only direct service is immunizations. There probably would be some providers that would be very important to communicate with again, because now OHA might be the direct contactor. Maybe the communication plan should be kept broad at first, with the understanding that these providers might still be doing that work, with the governing body taking back the responsibility. Keeping the communication plan broad enough to have communication with partners, and providers, and residents might be a way to make sure that there is thinking through of that, but not get too specific.

Ms. Drum stated that the OHA team would bring back some proposed language around that.

Commissioner Freeman added that if the transfer back happened sooner than four years, there should be some kind of analysis to determine if that would be a better service delivery system. There needs to be a mechanism to evaluate the county’s ability to do the public health services better than OHA did them. Maybe that happens without a rule and it is implied, but there should be some analysis before OHA authorizes a county to get back public health responsibilities early, especially if public health is the priority.
Ms. Cowling shared that she assumed that with the limited list of mandated requirements for OHA that the residents would benefit from more and enhanced services, because the list for a LPHA is longer than the list for OHA.

Ms. O’Fallon pointed out that if it was past the four-year mark, OHA couldn’t say that it was doing the services better than the LPHA and it wouldn’t give it back. She wondered if such analysis would be fair just because it was sooner than four years. It is unclear how and with what resources that sort of analysis would get done.

Ms. Drum wondered if the analysis could be part of the rationale for the request.

Commissioner Freeman explained that what he was trying to avoid was a political reason. For example, somebody runs for office on the platform that the county will do public health. They get elected and they put a plan together that may or may not be better than what the state is doing. The analysis would check whether the county plan is better. If it isn’t, then the county is not going in the right direction.

Mr. Smith remarked that if such a rule was to be included, it should be worded to the effect of “as part of this process, the state may consider the relative effectiveness of the transfer”. The rule is included and flagged in situations like this. This way, OHA has coverage in a scenario like this where somebody wants to have the transfer without good planning and research. OHA does need a reason to say that it was the guardian of public health in the county for the first four years.

Ms. Cowling noted that some of the rationale could be captured in rule 7.b., so OHA could have a better understanding of what has changed in a community or what the thinking of the commissioners was or the potential community impact. Maybe an explanation of the rationale and the community benefit should be included under the reasons for the request.

Ms. Drum acknowledged Ms. Cowling’s concern and promised that the OHA team would think through potential ways to address that and bring it back to the committee.

Ms. Cowling asked if the county had to provide a reason for the transfer back (rule 7.b.) if the transfer was prior to four years.

Ms. Drum answered that if the transfer back happened after four years, rules 7.a. and 7.b must be completed by the county. If the transfer back happened less than four years, rules 7.a., 7.b., and 7.c. must be completed.

Mr. Paul commented that rule 7.c.E. was absolutely essential. It should be kept, with or without the word detailed. This rule is important for the success of the new public health department. The communication plan should be the responsibility of both OHA and the local government.
Ms. O’Fallon asked the committee if a rule should be added that asked the county whether or not it intended to do the work itself or contract it.

Ms. Drum answered that rule 7.c.B. stipulated the provision of “any contracts that will be executed to support the fulfillment of LPHA responsibilities.”

Ms. O’Fallon added that section 7 read “the governing body of the LPHA... may submit a written request, requesting the responsibilities be transferred back.” That entity is not a LPHA anymore. The rule should say “the governing body of the county” or “the health district” or “requesting jurisdiction.”

Ms. Drum asked Ms. O’Fallon to correct that rule and read section 8 and 9.

Ms. O’Fallon suggested that in the case of a requesting jurisdiction before four years, OHA had to make a decision if it wanted to enter into an agreement with the county. It is an interim decision, whereas if it’s after four years, there’s none.

Ms. Drum suggested to put a timeline on that process.

Mr. Smith added that in addition to the timeline, some action items should be included as well. To get responsibilities back, there should be no timeline. When a county gives up responsibilities, it will take 180 days.

Ms. O’Fallon remarked that she always advised against agencies putting timelines for themselves in rules, which everyone else hates. A timeline gives people an opportunity to complain if a deadline is not met. There’s no consequence for not meeting a deadline. An agency doesn’t like to violate deadlines either, but things happen.

Commissioner Freeman stated that not having a timeline allows the OHA to have enough time to put something in place. If a county requested back responsibilities, it shouldn’t get them back until the county was ready. A county wouldn’t want to agree to anything quicker than what it needs, and it wouldn’t want to wait any longer either. Having a timeline isn’t necessary in a situation where both sides have to agree.

Mr. Smith responded that the only thing a timeline would do was if a county was anxious to get back responsibilities and the rule said that it should happen within six months, a county could refer back and ask why it isn’t happening. It’s a push to get the transfer negotiations and agreement done in 180 days. It could take less time, or the parties could agree to take more time. But once a request is made, the timeline is the expectation of the rule. It could happen the same way on the flip side. This would be the argument in favor of a timeline.
Ms. Cowling commented that a fiscal timeline might be a driver for both OHA and county commissioners. If county is putting in a budget plan, it might be impractical to go before the next fiscal cycle, because the county needs to make sure that it has the funds.

Commissioner Freeman shared that Douglas County has historically funded public health with general fund dollars. The county’s contribution to the current level of services is about 25% of what the county puts in contingency. This way, the county would not have to wait for a budget cycle if it decided to do what would be for Douglas County 500K of general fund. That amount is built into the budget to make little adjustments throughout the year. Most counties would have a mechanism mid-fiscal year. It’s different at the county level, compared to the legislature. It is difficult for the legislature to go back and change things. At the county level, it is relatively easy to change things. If a county changes its mind and has good people in place and it has a plan to do a better job with the public health services, or offer more services than the state, they can make that determination relatively quickly and move toward it.

Ms. Drum noted the concern that people didn’t want OHA to be sitting on this and acknowledged the need for flexibility to work through what the schedule for a transfer back would be because of the practical reasons.

Ms. Cowling added that if the request being asked for was sooner than four years, the answer could be a no.

Ms. Drum agreed that Ms. Cowling’s point must be included in the rules.

Ms. O’Fallon added that there had to be some criteria for how OHA would make that decision.

Ms. Drum read section 10, which was about OHA not being obligated to terminate contracts and agreements early for the provision of services in a community in the event of a transfer back. It doesn’t mean that OHA wouldn’t terminate them, but it also doesn’t mean that OHA has to terminate them.

Mr. Smith asked if it was clear how much funding a county that took back responsibilities gets.

Ms. Drum answered that it depended on the program area and many formulas.

Mr. Smith asked what level of funding should a county expect when they take back responsibilities.

Ms. Drum explained that the funding would be based on what the current formula agreement was at the time the county took back responsibilities. There is language in the rules to the effect that OHA is not required to provide the same level of funding that it had previously provided prior to the transfer.
Mr. Smith stated that his question was about the other scenario where a county just gained back the responsibilities, thinking that it would get an X amount based on conversations with other counties and doing due diligence. How do we ensure that OHA and the LPHA are on the same page in terms of the funding?

Ms. O’Fallon answered that this would be negotiated in the financial assistance agreement.

Ms. Drum added that OHA had to initiative a financial assistance agreement to have a mechanism to get the funding. Practically, the county would submit a financing plan and OHA would look at the assumptions in the plan, including assumptions about funding from OHA to do the public health work. If that assumption wasn’t there, OHA would go back to section 8 and clarify things. If the assumptions seemed way off base, OHA would look at the financing plan and provide the county more accurate information based on the funding formula.

Mr. Smith remarked that his concern was about anticipating a situation where a county did not perceive the funding amount it would get and calculate it differently.

Ms. Drum explained that that was part of the process of working through the transfer and what happens when there was a transfer back.

Ms. O’Fallon said that in the context of negotiating the written agreement, both parties would need to know which PEs they would be doing. The financial agreement is negotiated at the same time. If at some point the county officials said that they were way off base and there was no way for them to get the money to do the work, they haven’t repealed the ordinance and they could decide to walk away.

Ms. Drum pointed out that for that scenario to be addressed, there would have to be a separate process set up in the rules.

Mr. Smith stated that he was not advocating for OHA to do that, but that could be an issue because of the timing of the transfer. Then OHA would have to wait another six months because the LPHA has spent big amounts of money in ways that OHA would not.

Ms. Cowling noted that section 10 made a lot of sense to her because OHA already would have had contracts in place and it shouldn’t cancel those contracts early. The piece that she didn’t understand was the back and forth about the budget. She’d liked putting in an OAR for the public health responsibilities, but it seemed like section 9. The committee could add a little specificity around other information necessary. The LPHA is coming up with the written agreement and it’s doing the schedule around what the transfers are, and at some point the governing body of the transferring jurisdiction should have some sense of the responsibilities and the current resources that could be on the table, based on what’s left in the funding formula. OHA would be doing and spending some of it. For example OHA is doing communicable disease and assuring some of these functions. But the funding might be gone,
because there might have been an outbreak in Wallowa County and OHA had to use all of the funding.

Ms. Drum answered that there could be language in section 9 about estimated funding and start of the financial assistance agreement and program elements.

Ms. Cowling said that that didn’t have to be very specific, because the county would get the funding formula funding. Some back and forth around that process is needed.

Mr. Smith added that it was important to think these things through, because there may be an incentive to wait three more months once a claim transitioned. The statute doesn’t lay out any of it and it doesn’t require any of it.

Ms. Drum pointed out that there may be some things, depending on how WIC, for example, was currently being delivered in that jurisdiction. If OHA had a contract, maybe the intention would be for WIC, because it was not part of the statutory responsibilities, to go to that LPHA later. There needs to be flexibility. There also has to be something similar that provides some guidance about what OHA estimates that might be.

Ms. Cowling asked if sections 8, 9, 10 went into effect whether the criteria were delivered or not. If it’s been five years, the county states its reasons for the request, drafts an agreement with OHA for the timeline, and so forth. But there is no decision point for OHA, unless the transfer happens in less than four years.

Mr. Smith said that it was only sections 9 and 10. Section 8 was about clarifying the additional information for a transfer of less than four years.

Ms. Drum stated that there was a reason for OHA to ask questions about a governing body’s rationale.

Mr. Smith noted that OHA could still ask for something that would be helpful in the transfer, but it was not required.

Ms. Drum confirmed that the language was very clear that OHA couldn’t say no. There might be things that OHA could bring up to help the transfer.

Ms. Cowling remarked that rule 7.c.E should happen whether or not it had been four years or less. There should be some community conversation about the change of responsibilities, but maybe it goes in a different part of the timeline.

Ms. Drum asked if rules 7.c.D and 7.c.F needed to be part of the final written agreement, because they happened regardless.
Ms. Cowling answered that it made more sense to her. Instead of review criteria, it is a plan for timeline and execution of the transfer.

Mr. Smith said that while that was a good thing, OHA couldn’t require it. It could be encouraged, but statutorily the right of the counties [takes priority]. The language shouldn’t confuse the rule by stating “shall”, but rather “should” or “this may include.”

Ms. Drum thanked the committee members for their feedback. The OHA will make revisions to the draft and bring it back for further review and comment. At the next meeting, the committee will also review the fiscal impact statement and the statement of need, which are part of the package that is submitted to the Secretary of State. The committee will also come back to the question about the unintended consequences around communities experiencing disparities.

**Public comment**

Ms. Drum invited members of the public to ask questions and provide comments.

There was no public comment.

**Closing**

Ms. Drum adjourned the meeting at 2:15 p.m. The next meeting will be on January 21, 2020.