



Montana Legislative Services Division
Legal Services Office

To: Members of the Local Government Interim Committee
From: Julie Johnson, Staff Attorney
Re: Unfunded Mandate Laws in Montana

Date: September 7, 2023

I. INTRODUCTION

Montana has passed laws that prohibit the Legislature from enacting legislation "that requires a local government unit to perform an activity or provide a service or facility that requires the direct expenditure of additional funds and that is not expected of local governments in the scope of their usual operations" unless the legislation provides "a specific means to finance the activity, service, or facility other than a mill levy." Section 1-2-112, MCA. This statute is intended to prohibit legislation from creating what is commonly referred to as an "unfunded mandate". This memo is designed to provide an overview of the unfunded mandate laws in Montana and the very limited case law addressing these laws.

II. STATUTES

Section [1-2-112](#), MCA is the governing statute on unfunded mandates and provides as follows:

1-2-112. Statutes imposing new local government duties. (1) *As provided in subsection (3), a law enacted by the legislature that requires a local government unit to perform an activity or provide a service or facility that requires the direct expenditure of additional funds and that is not expected of local governments in the scope of their usual operations must provide a specific means to finance the activity, service, or facility other than a mill levy. Any law that fails to provide a specific means to finance any activity, service, or facility is not effective until specific means of financing are provided by the legislature from state or federal funds.*

(2) *Subsequent legislation may not be considered to supersede or modify any provision of this section by implication. Subsequent legislation may supersede or modify the provisions of this section if the legislation does so expressly.*

(3) *The mandates that the legislature is required to fund under subsection (1) are legislatively imposed requirements that are not necessary for the operation of local governments but that provide a valuable service or benefit to Montana citizens, including but not limited to: (a) entitlement mandates that provide that certain classes of citizens may receive specific benefits; (b) membership mandates that require local governments to join specific organizations,*

such as waste districts or a national organization of regulators; and (c) service level mandates requiring local governments to meet certain minimum standards.

(4) Subsection (1) does not apply to:

(a) mandates that are required of local governments as a matter of constitutional law or federal statute or that are considered necessary for the operation of local governments, including but not limited to: (i) due process mandates; (ii) equal treatment mandates; (iii) local government ethics mandates; (iv) personnel and employment mandates; (v) recordkeeping requirements; or (vi) mandates concerning the organizational structure of local governments;

(b) any law under which the required expenditure of additional local funds is an insubstantial amount that can be readily absorbed into the budget of an existing program. A required expenditure of the equivalent of approximately 1 mill levied on taxable property of the local government unit or \$10,000, whichever is less, may be considered an insubstantial amount.

(c) a law necessary to implement the National Voter Registration Act of 1993, Public Law 103-31. (Emphasis added).

The current version of section 1-2-112, MCA, was last amended in 2001 by House Bill No. 124, which is commonly referred to as the "Big Bill," and made significant changes to the section.

In a nutshell, section 1-2-112, MCA, prohibits the Legislature from passing laws that require a local government to perform an activity or provide a service "that is not necessary for the operation of local governments but that provide a valuable service or benefit to Montana citizens" unless "the required expenditure is an insubstantial amount that can be readily absorbed". Section 1-2-112(3) and (4)(b), MCA. An insubstantial amount is the lesser of "approximately 1 mill levied on taxable property of the local government unit or \$10,000." 1-2-112(4)(b), MCA. Local governments, however, must absorb certain mandates related to due process, equal treatment, etc. Section 1-2-112 (4)(a), MCA.¹ Importantly, section 1-2-112(2), MCA, allows subsequent legislation to impose an unfunded mandate if the bill does so expressly. In that case, the title of a bill that imposes an unfunded mandate must include "SUPERSEDING THE UNFUNDED MANDATE LAWS" as well as a section that provides: "**Unfunded mandate laws superseded.** The provisions of [this act] expressly supersede and modify the requirements of 1-2-112 through 1-2-116."

Section [1-2-114](#), MCA, also addresses the limitation on the introduction of bills that place requirements on a local government without also providing funds. Section 1-2-114 provides:

1-2-114. Bill restriction. (1) A bill may not be introduced enacting a new law or amending an existing law to require a local government unit to perform an activity or provide a service or facility that requires a direct expenditure of additional funds without a specific means to finance the activity, service, or facility in violation of 1-2-112 or 1-2-113.

¹ 1-2-113 provides for the same restriction on unfunded mandates for school districts.

(2) The estimate of fiscal impact provided in accordance with 5-4-210 must be considered in determination of whether a bill is introduced in violation of subsection (1).

Section [1-2-115](#), MCA, provides a mechanism for local governments to enforce the provisions of section 1-2-112, MCA:

1-2-115. Enforcement. *(1) A local government unit may use a remedy provided in subsection (2), (3), or (4) to prevent the application of a law enacted in violation of 1-2-112 or 1-2-113.*

(2) A local government may, with the consent of a state agency charged with the implementation of the law, arbitrate the application of the law pursuant to the Uniform Arbitration Act.

(3) A local government unit may request a hearing before an administrative agency charged with the administration of the law. A hearing held pursuant to this section is a contested case proceeding pursuant to the Montana Administrative Procedure Act. The decision of the agency may be appealed in accordance with Title 2, chapter 4, part 7.

(4) A local government unit may bring a civil action in the district court of the county in which the local government unit is located to prevent the application of a law enacted in violation of 1-2-112 or 1-2-113. The state of Montana may be named as the respondent or defendant in an action brought pursuant to this section.

Finally, section [1-2-116](#), MCA, prohibits a state agency from shifting costs to local governments. Section 1-2-116, MCA, provides:

1-2-116. State agencies not to shift cost to local governments. *(1) A state agency may not take any action prohibited by subsection (2) without authorization in state law.*

(2) A state agency may not demand, bill, request, or otherwise require a local government to take any of the following actions or make the provision of a service to a local government that is required by state law to be provided to that government contingent on the local government taking any of the following actions:

(a) pay for all or part of the administrative costs of a program, activity, or undertaking required by state law to be carried out primarily by a state agency;

(b) pay for costs of computer hardware or software used in the operation of a state program, activity, or undertaking or pay for the application of either hardware or software in a state program;

(c) pay for forms required to be completed either by a local government or by third persons through a local government office and used by or filed with a state agency; or

(d) pay for the filing in a state office of forms required by state law to be completed by a local government.

(3) (a) A local government may refuse to pay for services billed or charged to it by a state agency in violation of this section. Upon refusal by the local government, the state agency

may send to the local government a written notice of the program or activity for which the local government is billed, a detailed statement of the amount of the bill or charge, and a citation to the legal authority requiring the local government to pay the bill or charge.

(b) Within 30 days of receipt of the notice required by this subsection (3), the local government shall pay the bill or charge or request a hearing before the state agency. Upon request, the state agency shall provide a hearing. If a local government fails to pay the bill or charge and fails to request a hearing, the state agency may initiate a contested case proceeding. Proceedings authorized by this subsection must be held in accordance with the provisions of the Montana Administrative Procedure Act governing contested cases. A decision of the state agency following opportunity for a hearing may be appealed to the district court as provided in 2-4-702.

(4) The remedy provided in subsection (3) is exclusive of any other remedy provided in law for a state agency claiming a right to recover an administrative cost from a local government and is exclusive of any other remedy provided in law for a local government refusing to pay a bill or charge of a state agency.

(5) This section does not apply to services provided by a state agency pursuant to a written or oral contract.

(6) The following definitions apply to this section: (a) "Administrative cost" means the cost of administering a program, activity, or undertaking, including costs for salaries, wages, rent, heat, electricity, computer hardware, computer software, telephone, travel, equipment, supplies, or postage. (b) "Local government" means a county, city, town, township, school district, or other district or local public entity with the authority to spend or receive public funds. (c) "State agency" means a department, board, commission, office, bureau, or other public authority of state government.

I have no data on when or whether a local government has ever refused to pay for services billed or charged to it by a state agency in violation of section 1-2-116, MCA, or whether a state agency has ever initiated a contested case proceeding under the Montana Administrative Procedure Act because a local government has refused to pay for services billed by the state agency.

III. ADDITIONAL AUTHORITY

There is a dearth of case law about unfunded mandates in Montana.²

The last time the Montana Supreme Court considered these laws was in 1999 in Department of Corrections v. Lake County, 1999 MT 148, 295 Mont. 46, 983 P.2d 327. In that case, a state district court committed a delinquent youth (J.A.) to the Department of Corrections (DOC) for placement in a Texas treatment center and ordered the DOC to pay for the youth's transportation to the treatment center. At the time, state law provided that "the expenses of committing a youth... and transporting the youth to the Pine Hills correctional facility or the place designated by the department for it to receive custody, as well as the expense of returning

² There are two Attorney General opinions, 38 A.G. Op. 112 (1980) and 42 A.G. Op. 30 (1987), which touch on unfunded mandate laws, but neither are included in this primer. The relevancy of the two opinions is limited given the passage of SB 124 which removed most of the language in 1-2-112 addressed by the Attorney General in those opinions.

the youth the county of residence, must be borne by the county of residence." [Section 52-5-109, MCA \(1997\)](#).

Despite the court order, the DOC to pay for the costs of transporting the youth to Texas. The DOC refused, citing section 52-5-109, MCA. Lake County paid for the youth's transportation to Texas and subsequently filed an action against the DOC, alleging that the statute violated the unfunded mandate law of section 1-2-116, MCA. The Supreme Court ruled in favor of Lake County; however, instead of ruling that the section was an unfunded mandate, the Court based its ruling on the plain meaning of sections 52-5-109 and 52-5-101, holding:

We conclude that the plain meaning of 52-5-209 is that counties pay for the transportation of committed youth only within the state of Montana....It is logical to assume that the legislature contemplated that a Montana agency [the DOC] would "receive custody" of the youth in the state of Montana, not Texas.

Department of Corrections v. Lake County, 1999 MT at ¶ 24. Unfortunately, the Supreme Court did not address the plaintiff's argument that the statute constituted an unfunded mandate because it affirmed the district court on an alternative theory.

IV. CONCLUSION

In conclusion, Montana law prohibits the Legislature from passing a law that requires a local government to perform an activity or provide a service "that is not necessary for the operation of local governments but that provide a valuable service or benefit to Montana citizens" unless "the required expenditure is an insubstantial amount that can be readily absorbed". Any proposed legislation that requires the expenditure of a substantial amount by local governments³ must expressly state that the proposed law supersedes the unfunded mandate laws in the title of the bill.

³ Excluding those mandates that are required of local governments as a matter of constitutional law or federal statute or that are considered necessary for the operation of local governments. Section 1-2-112(4) MCA.