

Opinion No. 34

**STATE BOARD OF HEALTH; Rules and Regulations; Public
Health Nursing—Fees for T.B. X-Rays;—STATE BOARD OF
HEALTH; Rules and Regulations; Home Care of the Sick.
Sections 69-107, 69-607, 69-801, 69-802, 69-811, 69-812,
69-3202, R.C.M., 1947.**

- HELD:**
- 1. The power of the State Board of Health to promulgate rules and regulations concerning public health nursing is limited to those subjects specifically enumerated in sections 69-107 and 69-3202, R.C.M., 1947.**
 - 2. Sections 69-107 and 69-3202, R.C.M., 1947, do not authorize public health nurses employed by county health units to care for the sick in their homes.**
 - 3. County boards of health and full-time health departments are not authorized to charge fees for x-rays taken in conjunction with a tuberculosis control program.**

July 31, 1964

John S. Anderson, M.D.
Executive Officer
State Board of Health
Helena, Montana

Dear Mr. Anderson:

You have requested my opinion on the following questions:

1. What is the extent of the rule and regulation making power of the State Board of Health conferred by sections 69-107, 69-802 and 69-3202, R.C.M., 1947, with regard to public health nursing?
2. Do sections 69-107 and 69-802, R.C.M., 1947, authorize the use of public health nurses for the care of the sick in their home?
3. If so, may a fee be charged for such services?
4. May a fee be charged by a county board of health for x-rays taken in conjunction with tuberculosis control program?

As to your first question, the pertinent portion of section 69-107 reads as follows:

“The state board of health shall have power to promulgate and enforce such rules and regulations for the better preservation of the public health **in contagious and epidemic diseases** as it shall deem necessary, **and also regarding the causes and prevention of diseases, and their development and spread * * ***” (Emphasis Supplied)

Section 69-802 provides for the establishment of county health units by county commissioners, the personnel of said units “to devote their entire time to the prevention of disease and the promotion of the public health.”

Section 69-3202, Revised Codes of Montana, 1947, provides in part:

“(a) School boards may employ, in their discretion, regularly qualified nurses, duly registered in the state of Montana, to act as school nurses. * * *

“(b) County commissioners are hereby authorized at such time as they deem necessary, to employ regularly qualified nurses, to be known as county nurses, **for duties pertaining to maternal and child health.**

“(c) The state board of health is hereby constituted the agency of the state of Montana to supervise and regulate school, county and public health nurses in the performance of their duties **under all such employments;** and the board shall make, publish, and from time to time, revise and amend, as necessary, and at all times, enforce suitable rules and regulations governing the qualifications and professional activities, duties, services and administratons of school, county and public health nurses, **as such,** and all such regulations when properly adopted, properly identified and reasonably adequate to protect public health, shall have the force of law. * * * ” (Emphasis supplied)

The emphasized portions of subsection (c) of section 69-3202 Revised Codes of Montana, 1947 refer to those employments provided for in subsections (a) and (b), that is, school nurses and county nurses engaged in maternal and child health duties. Section 69-3202, supra, was enacted as part of Section 24, Chapter 264, Laws of 1955. The title of Chapter 264 contains the following

language: “* * * and to State and Define in Sections Numbered 69-3201 through 69-3205, Revised Codes of Montana, 1947, Inclusive Under Said Chapter 32, the Function, Powers and Duties of the Board in the Fields of (A) Maternal and Child Health * * *.”

The title of this chapter and the wording of the statute both indicate that, under section 69-3202, *Supra*, the Board may make rules and regulations concerning public health nursing only insofar as they relate to the practice of public health nursing in maternal and child health. The rule and regulation making power conferred on the board by section 69-107 Revised Codes of Montana, 1947, is also limited to those subjects which are emphasized in the statute as set out above.

“The general power to make rules and regulations, unlimited except that they shall not be contrary to law, is coextensive with the state police power as it affects public health. We think it clear that under this general language the state board of health is not empowered to pass rules and regulations having the force of law regulating the conduct of the people of the state with respect to all matters having some relation to the public health. This, indeed, would be the delegation of legislative power if the words of the statute should be so construed. The language must be taken to be limited to the particular matters and things specified in succeeding sections of the statute wherein duties are imposed upon the state board of health with respect to particular subjects or situations with respect to the public health. (*State v Goss*, 79 Utah 559, 11 P. 2d 340, 342 (1932)).

It is my opinion that section 69-802, *supra*, confers no rule and regulation making power on the board.

Your second and third questions pertain to the power, if any, given by sections 69-107 and 69-802 Revised Codes of Montana, 1947, to have public health nurses provide care for the sick in their homes. As noted above, section 69-107, *supra*, only vests in the state board of health the power to promulgate rules and regulations “for the better preservation of the public health in contagious and epidemic diseases,” and also regarding the causes, prevention, development, and spread of diseases. Section 69-802

supra, merely requires that the personnel of county health units "devote their entire time to the prevention of diseases and the promotion of the public health." The general terms used in these two statutes, in the absence of more specific and express provisions, could not be said to authorize the use of public health nurses for the care of the sick in the home. If an attempt was made to construe these two statutes to extend to this activity, the statutes would be susceptible to the constitutional objection which was sustained in **Bacus v. Lake County**, 138 Mont. 69, 354 P. 2d 1056 (1960).

The fourth question set forth in your letter concerns the charging of a fee for x-rays taken in conjunction with tuberculosis control program.

There is of course no provision in the statutes expressly authorizing the charging of a fee for such a service. Sections 69-607 and 69-812, R.C.M., 1947, provide that the operating expenses of county boards of health and full-time health departments shall be paid out of the general fund of the particular county. There are also provisions for the use of grants and other contributions. See sections 69-801 and 69-811, R.C.M., 1947.

Since there is no provision for charging a fee for rendering such a service and because the statutes specifically provide for the methods of paying expenses incurred by county boards of health and full-time health departments, it is my opinion that a fee cannot be charged for x-rays taken in conjunction with a tuberculosis control program.

Very truly yours,
FORREST H. ANDERSON
Attorney General