



Emergency Manager Law Primer

Protecting the Public's
Health During Financial
Emergencies: Lessons
Learned from the Flint
Water Crisis

January 2018

 **SCHOOL OF PUBLIC HEALTH**
UNIVERSITY OF MICHIGAN

 **deBeaumont**
FOUNDATION

 **The Network**
for Public Health Law



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Protecting the Public's Health During Financial Emergencies: Lessons Learned from the Flint Water Crisis

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Support for this project was provided by the de Beaumont Foundation. Since 1998, the de Beaumont Foundation has worked to transform public health in the United States. The de Beaumont Foundation's mission is to strengthen and transform public health in the United States. The Foundation improves the effectiveness and capacity of local and state health departments through research, collaboration, and strategic grantmaking.



Support for the Network is provided by the Robert Wood Johnson Foundation (RWJF). The views expressed in this report do not necessarily represent the views of, and should not be attributed to, RWJF.

Emergency Manager Law Primer

Fiscal distress laws, such as municipal bankruptcy legislation, authorize state or municipal governments to counteract a municipal government fiscal emergency. Laws establishing the appointment of an emergency manager constitute a specific subset of fiscal distress laws. Once appointed, the emergency manager is granted authority and responsibility for assuring some or all aspects of local governmental operations, including financial oversight, during a financial emergency.

This fact sheet addresses the purpose of emergency manager laws; how they operate; the emergency manager's powers, duties and limitations; the role of citizens and elected officials while under emergency management; transition after emergency management; and the intersection of emergency manager laws with other laws.¹ The goals are to illustrate the variety of state emergency manager laws based on key features and to examine differences in their implementation. We conclude with recommendations for revising and implementing emergency manager laws to assist communities in financial distress without undermining the public's health and safety.

1. Purpose of Emergency Manager Laws

Emergency manager laws are designed to address issues that arise when municipalities experience fiscal distress. What constitutes fiscal distress will vary across jurisdictions, but a general definition is "a significant and persistent imbalance between revenues and expenditures."² The principal sources of municipal fiscal distress are "economic decline, tax base erosion, demographic changes, federal and state mandates, federal revenue cuts, state tax levy limits, recessions, and mismanagement."³ Emergency manager laws allow state government intervention in local government operations to address and eliminate the conditions leading to fiscal distress. At least in some states, when an emergency manager is appointed, local officials are stripped of their powers; executive and legislative functions and duties are vested in the emergency manager.

2. How emergency manager laws operate

Along with generally outlining the conditions constituting fiscal distress, state laws describe the procedures, powers, and responsibilities the state and local government should take once the law is invoked, and how a fiscal crisis will be resolved.⁴ States use a number of mechanisms to protect municipal finances and prevent or resolve local fiscal distress. For example, measures might include one or more of the following: debt limitations; revenue and spending caps; limits on tax rate increases; requirements for balanced budgets; the issuance of refunding bonds; municipal debt monitoring programs; technical assistance or training programs; financial assistance or restructuring mechanisms; review or approval of local debt issuances; review or approval of local budgets for compliance with law; and limits on municipal investments.^{5 6}

To implement these measures and oversee the local government, states may appoint an emergency manager, which allows the state to control and/or supervise the administration and restructuring of municipal finances. To date, 20 states have adopted emergency manager laws, while the remaining states use a variety of mechanisms in response to fiscal distress.⁷ Once a municipality is in fiscal distress, states with emergency management laws have the power to declare a financial emergency and intervene in the municipalities' operations. In our review of 10 states with emergency manager laws, four of them are required to declare a financial emergency, while the other six states have discretionary authority.

The form and appointment method of an emergency manager varies across jurisdictions and can include

oversight by a state receiver, a state agency, or a financial control board. In some states, such as Michigan, the Governor appoints a single individual as an emergency manager who “acts for and in the place and stead of the governing body and the office of chief administrative officer of the local government.”⁸ In other states, such as New York, the emergency manager takes the form of a control board.⁹

3. Powers, duties, and limitations of an emergency manager

The powers, duties, and responsibilities of emergency managers are tailored to each jurisdiction, with no uniformity across states. Despite this variation, the laws generally cover:

- Legal authority to intervene to prevent a local financial emergency
- Legal authority to intervene in a local financial emergency
- Legal authority and duties of the intervener
- Legal authority to file for Chapter 9 bankruptcy, and
- Other legal mechanisms available to prevent or address local fiscal emergencies.

These categories capture the most important features of state laws regarding measures to address local fiscal distress. Each of these categories further specifies state law requirements for, or alternatives to, intervention, allocation of responsibility, limits on authority, responsibilities or structures imposed to protect the community, and methods for assuring accountability. Table 1 below illustrates the wide variety among emergency manager laws in the ten states using the categories above.

Table 1: States With Emergency Manager Laws

State	Legal authority to intervene prior to a local financial emergency? Mandatory or Discretionary?	Legal authority to intervene in local financial emergencies? Mandatory or Discretionary?	If yes, does the intervener have a duty to engage local government or residents in decision making?	If yes, does the law include criteria for decision making by the intervener?	If yes, does the law require the intervener to consider health impacts in decision making?	Is there a state legal structure allowing or prohibiting municipal bankruptcies?	What other legal mechanisms are in place for preventing or addressing local fiscal emergencies?
Arizona	No.	Yes, mandatory.	No.	No.	No.	Allowed.	None.
California	No.	Yes, mandatory.	Yes.	No.	No.	Allowed.	None.
Iowa	No.	Yes, discretionary.	N/A.	N/A.	N/A.	Prohibited, with exception.	None.
Maine	Yes, discretionary.	Yes, discretionary.	No.	No.	No.	Prohibited.	State funding for municipalities financially unable to provide for direct relief and work programs or its share of public assistance programs.
Michigan	No.	Yes, discretionary.	Yes.	Yes.	Yes.	Allowed.	None.
Nevada	Yes, discretionary.	Yes, mandatory.	No.	No.	No.	Prohibited.	None.
New Jersey	Yes, discretionary.	Yes, mandatory.	No.	No.	Yes, but it is limited to provisions regarding dissolution.	Allowed.	Technical assistance.
North Carolina	Yes, discretionary.	Yes, discretionary.	Discretionary.	No.	No.	Allowed.	None.
Oregon	No.	Yes, discretionary.	Yes.	No.	No.	Allowed.	None.
Rhode Island	Yes, discretionary.	Yes, discretionary.	Yes, the budget commission includes the elected chief executive officer of the city and one elected council member of the town or city.	No.	Yes, powers shall be carried out having due regard for the needs of the citizens in such a manner as will best preserve the safety and welfare of citizens of the state.	Allowed.	None.

Only three of these states contain provisions aimed specifically at protecting the public's health and requiring the intervener to consider the health effects when making decisions. The other seven lack such constraints. None of the states examined gives specific guidance on implementation requirements for community engagement or the protection of the public's health, such as detailed policies and procedures. Michigan and Rhode Island, provide a broad duty to execute the law in a manner that preserves the safety and welfare of citizens of the state, but do not mandate the emergency manager to take them into account.¹⁰

4. The role of community members and elected officials while under emergency management

Despite the central role community members and elected officials play in local governmental functions, fiscal distress laws often fail to include local representation during state emergency management decisionmaking. This raises concerns regarding democratic disenfranchisement and a lack of local political accountability. Nonetheless, some states provide for local representation in the process. For example, Rhode Island uses a five member budget commission as receiver, which must include the mayor and a council member.¹¹ Oregon requires written intergovernmental agreements with approval from a majority of the local governing unit. Oregon also requires the Governor to consult with local officials, including the sheriff and the local elected state representatives. Additionally, intergovernmental agencies retain the power to adopt rules to implement the intended functions.¹²

5. Transition after emergency management

The ultimate goal of local fiscal distress laws is to reinstate the local government's financial stability. Remarkably, most state fiscal distress laws do not adequately address the conditions initiating the transition of control back to local government after financial stability has been achieved. This ambiguity can lead to a struggle between state and local governments about when state intervention should end.

States employ a variety of mechanisms to restore local governmental fiscal control. The Michigan Department of the Treasury, for instance, determines whether the original causal conditions have been eliminated. The department also relies on the emergency manager's opinion in determining when an emergency declaration should be terminated.¹³ Maine law does not specify what conditions prompt the end of a fiscal emergency. Instead, the oversight commission makes the decision to end a fiscal emergency.¹⁴ New Jersey law specifies the conditions for withdrawing state intervention and gives the Governor the power to end a fiscal emergency.¹⁵

6. Intersection of emergency manager laws with other laws

Because emergency manager laws are designed allow state governments to intervene in local governmental operations, they affect or displace laws establishing local government and its powers, including enacting laws and adopting rules, raising taxes, bargaining collectively, entering into contracts, and budgeting. In short, emergency manager laws may affect all or many aspects of local operations and services, as well as local government's responsibility and accountability for both the short-term and the long-term health of the community.

What often gets lost, though, is that while appointing an emergency manager may upend operations specifically within the local government, the appointment does not affect responsibility or authority at other levels of government. Federal and state agencies still have the same oversight responsibilities, and must assure that whoever is in charge of the local government is still performing that government's public health and/or environmental responsibilities adequately. Where local public health services are provided at a different level of local government (e.g., at the county level where a city is under emergency management), the county's responsibilities also remain unchanged.

In sum, the overlapping governmental entities should exercise increased vigilance if the local community is deprived of a democratically accountable government. These entities should be especially attuned to protecting the public's health, such as safe drinking water, if the emergency manager is not doing so.

7. Examples of emergency manager law implementation

Michigan's and Rhode Island's emergency manager laws are described below. These laws illustrate differences in implementing an emergency manager, in particular, the extent to which local government is excluded or included in managing fiscal distress.

MICHIGAN

Michigan's emergency manager law, the Local Financial Stability and Choice Act,¹⁶ empowers the governor to place complete legal control of financially distressed Michigan municipalities in the hands of a state emergency manager. The emergency manager is appointed by and serves at the pleasure of the Governor, and is shielded from liability for his or her decisions. When an emergency manager is appointed, local officials are stripped of all of their powers, and all of their executive and legislative functions and duties are vested in the emergency manager. Indeed, the law specifically provides that upon the appointment of an emergency manager, "the governing body and the chief administrative officer ... shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager or as otherwise provided by this act."¹⁷

There are several steps that must occur prior to state intervention in a local fiscal emergency. The first step is a preliminary review to determine if probable financial stress exists for the local government.¹⁸ If probable financial stress is found, the governor then appoints a review team to determine whether a financial emergency actually exists in the local government.¹⁹ A financial emergency is found if one or more specified factors exists or is likely to occur, or if the local government failed to provide information or failed to comply with an already existing deficit elimination plan. The governor then makes the final determination.

Once a local financial emergency is confirmed, the local entity may select one of four options for redressing the financial emergency: (1) consent agreement; (2) appointment of an emergency manager; (3) neutral evaluation process; or (4) Chapter 9 bankruptcy proceeding.²⁰ If an emergency manager is appointed, which is the usual option selected, local officials are stripped of all of their powers and all of their executive and legislative

functions and duties are vested in the emergency manager. An emergency manager continues in his or her position until (1) the emergency is rectified; (2) the emergency manager is removed from office by the governor or through impeachment by the legislature; or (3) after eighteen months, the local governing body may vote to remove the emergency manager and proceed with a consent agreement or neutral evaluation.²¹ The statute does not provide specific criteria for determining that an emergency has been rectified, but states that "[a] local government shall be removed from receivership when the financial conditions are corrected in a sustainable fashion as provided in this act."²²

RHODE ISLAND

Rhode Island's emergency manager law provides that fiscal distress exists if the local government, through the mayor and city council, or the state government, through the director of revenue in consultation with the auditor general, meet any two or more specified elements regarding the local government's fiscal condition. The state has discretion to appoint a fiscal overseer to determine if a local financial emergency exists based on the fiscal overseer's determination that the local government: is unable to present a balanced budget; faces a fiscal crisis that poses an imminent danger to the safety of the citizens; will not achieve fiscal stability without the assistance of a budget commission; or that the tax levy of the fiscal year should not be approved. Once a fiscal emergency has been declared, state involvement is discretionary.²³

If the state does intervene, then a budget commission composed of five members is appointed as receiver.²⁴ Three of the members are designees of the director of revenue, one member is the mayor of the city, and the final member is a council member of the city elected to serve on the budget commission. Generally, the commission has the power to restructure debt, renegotiate labor contracts, increase taxes, and eliminate local government services. The commission must use due regard for the needs of the citizens in a way that will best preserve their safety and welfare. The commission is also expected to protect property and the access of the state, its municipalities, and fire districts to capital markets, all to the public benefit and good.²⁵ The director of revenue determines when a local fiscal emergency has been rectified and once the determination is made, can abolish the budget commission.²⁶

8. Recommendations

By definition, emergency manager laws address the symptoms, rather than the causes of local fiscal distress. When they disempower local government and eliminate community participation, their execution may exacerbate instead of relieving financial distress, jeopardizing a community's long-term interests. For this reason, alternative legal strategies for responding to local fiscal distress, such as municipal bankruptcy laws or state technical assistance, should be considered.

Where emergency manager laws are in place, the following recommendations may assist a community in financial distress to recover without undermining the public's health:

- A.** Emergency manager laws should explicitly require emergency managers to consider the public's health in decision-making. Emergency managers should first consult with and incorporate advice from public health departments, and then balance fiscal needs with protecting the public's health.
- B.** Emergency manager laws should be consistent with the expected norms of democracy rather than displacing democracy entirely. These laws should require emergency managers to: receive and respond to local public opinion, including on fiscal plans; offer some form of democratic representation during an emergency manager's tenure; and provide a legal mechanism for local residents to formally complain to the appropriate state agency with oversight responsibility for the emergency manager.
- C.** Emergency manager powers should not be vested in one person. An alternative, for example, is an emergency manager with a three-person team comprised of a financial expert, a local government operations expert, and a local ombudsman.
- D.** States should consider imposing a fiduciary duty standard requiring the emergency manager to act on the public's behalf.

Ultimately, for the long-term benefit of the community, cost must not be permitted as the primary factor in an emergency manager's decision that would directly affect the public's health and safety.

Endnotes

- 1 This discussion is based on a literature review regarding fiscal distress laws and review of ten states with fiscal distress laws that authorize appointment of an emergency manager and ten states with laws that do not authorize appointment of an emergency manager.
- 2 John M. Trussel, And Patricia A. Patrick, Predicting Fiscal Distress in Special District Governments, *Journal of Public Budgeting, Accounting & Financial Management*, 25 (4), 589-616 Winter 2013, available at http://pracademics.com/attachments/article/889/Article%201_Trussel_Patrick.pdf
- 3 Charles K. Coe, Preventing Local Government Fiscal Crises: Emerging Best Practices, *Public Administration Review*, Vol. 68, No. 4 (Jul. - Aug., 2008), pp. 759-767 at 759
- 4 Eric a. Scorsone, Working Paper, Municipal Fiscal Emergency Laws, Background and Guide to State-Based Approaches (No. 14-21, July 2014), available at <https://www.mercatus.org/system/files/Scorsone-Municipal-Fiscal-Emergency.pdf>, pg. 11
- 5 The PEW Charitable Trusts, *State Strategies to Detect Local Fiscal Distress* (September 2016, available at http://www.pewtrusts.org/~media/assets/2016/09/detecting_local_distress_report.pdf)
- 6 James E. Spiotto, Ann E. Acker, Laura E. Appleby, *Municipalities in Distress? How States and Investors Deal with Local Government Financial Emergencies*, Second Edition (2016), Chapman and Cutler LLP
- 7 The PEW Charitable Trusts, *The State Role in Local Government Financial Distress* 4 (July 2013, updated April 2016), available at http://www.pewtrusts.org/~media/assets/2013/07/23/pew_state_role_in_local_government_financial_distress.pdf.
- 8 Mich. Comp. Laws § 141.1549(1)
- 9 Eric a. Scorsone, Working Paper, Municipal Fiscal Emergency Laws, Background and Guide to State-Based Approaches (No. 14-21, July 2014), available at <https://www.mercatus.org/system/files/Scorsone-Municipal-Fiscal-Emergency.pdf>, pg. 5
- 10 See Mich. Comp. Laws § 141.1549(2) and R.I. Gen Laws § 45-9-1.
- 11 R.I. Gen. Laws § 45-9-6
- 12 Or. Rev. Stat. § 203.105
- 13 Mich. Comp. Laws § 141.1549(7)
- 14 30-A M.R.S.A. § 6110
- 15 N.J. Rev. Stat. §52:27BBB-1 et seq.
- 16 Mich. Comp. Laws § 141.1541, et seq.
- 17 Mich. Comp. Laws § 141.1549(1). Certain specified actions require approval and/or involvement by the local governing body (and strong mayor, if applicable), such as rejecting a provision of a collective bargaining agreement or transferring local assets, liabilities, or functions. Mich. Comp. Laws § 141.1559. In these cases, if the local governing body does not approve of the emergency manager's proposed action, it may propose an alternative plan and a decision shall be made by the local emergency financial assistance loan board. Other actions, such as dis-incorporating or dissolving the municipality (if a vote is required by law), Mich. Comp. Laws § 141.1552(1) (cc), selling or transferring a public utility furnishing light, heat, or power, Mich. Comp. Laws § 141.1552(4), or increasing or establishing new taxes, Mich. Comp. Laws § 141.1568, require the approval of a majority of electors. The local governing body (and strong mayor, if applicable) may also elect to remove an emergency manager who has served for at least eighteen months, even if the financial emergency continues to exist; the local government may then negotiate a consent agreement or proceed with the neutral evaluation process. Mich. Comp. Laws § 141.1549(6) and (7).
- 18 Mich. Comp. Laws § 141.1544(3)
- 19 Mich. Comp. Laws § 141.1544(4)
- 20 Mich. Comp. Laws § 141.1547
- 21 Mich. Comp. Laws § 141.1549(6), § 141.1549(63(d))
- 22 Mich. Comp. Laws § 141.1549(7)
- 23 R.I. Gen. Laws § 45-9-3
- 24 R.I. Gen. Laws § 45-9-5, § 45-9-6
- 25 R.I. Gen. Laws § 45-9-3, § 45-9-6
- 26 R.I. Gen. Laws § 45-9-6

Jacobson, P.D., Bernstein, J., Chrysler, D., Boufides, C.H., Citrin, T. (January 2018). Emergency Manager Law Primer (Protecting the Public's Health During Financial Emergencies: Lessons Learned from the Flint Water Crisis). Retrieved from debeaumont.org/LearningFromFlint/Primer.

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