BOARD OF PUBLIC EDUCATION
STRATEGIC PLANNING SESSION

JULY 11, 2018

Montana State Capitol Building

Room 172

Helena, MT

AGENDA

BOARD OF PUBLIC EDUCATION

STRATEGIC PLANNING SESSION AGENDA

July 11, 2018

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Wednesday July 1, 2018

3:00 PM

Welcome Sharon Carroll, BPE Chair

- Statement of Public Participation

Item 1 Discussion of Negotiated Rulemaking Process – Pete Donovan, OPI Staff

Item 2 Discussion of ARM 10.57.109 – Unusual Cases – Pete Donovan, OPI Staff

Public Comment

Adjourn

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Board of Public Education Strategic Planning Session Materials

The enclosed materials will assist the Board of Public Education and OPI staff to facilitate a discussion on negotiated rulemaking as the Board of Public Education considers updating its administrative rules. The discussion will include an overview of the negotiated rulemaking process as defined in statute and how this process relates to the Board of Public Education's constitutional authority to update administrative rules.

ITEM 1:

Document A is a copy of what is often referred to as the "Sherlock Decision" of 1989. The Board of Public Education adopted administrative rules that established gifted and talented programs in Montana's schools. The Montana Legislature challenged the Board of Public Education's authority to create administrative rules on gifted and talented education. The Board prevailed in the case establishing that the BPE has constitutional rulemaking authority as described in the summary judgement on page 5 of the attached decision.

Document B is a memo from OPI attorney Kyle Moen to Supt. Arntzen and BPE Chair Sharon Carroll, regarding the OPI attorney's opinion on the use of the negotiated rulemaking process for updates to the Board of Public Education's assessment rules contained in ARM 10.56.101.

Document C is a brief summary on the history of updates to the BPE assessment rules and some items OPI proposes to recommend updates for in ARM 10.56.101. OPI plans to submit these proposed updates to the BPE assessment rules to the negotiated rulemaking committee prior to submission to the Board of Public Education.

ITEM 2:

Item 2 contains two letters regarding the process for the BPE and OPI to process notification for hearings of unusual cases for educator licensure as defined in 10.57.109.

ITEM 1

DISCUSSION OF NEGOTIATED RULEMAKING PROCESS

Pete Donovan

OPI Staff

DOCUMENT A

MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

MONTANA BOARD OF PUBLIC EDUCATION, Petitioner,	Cause No. BDV-91-1072
vs.	
MONTANA ADMINISTRATIVE CODE COMMITTEE, Respondent.	ORDER AND DECISION

This matter is before the Court on motions by all parties for summary judgment.

FACTUAL BACKGROUND

In 1989, the Board of Public Education (hereinafter the Board), adopted Rule 10.55.804, A.R.M. That rule, in pertinent part, provided as follows:

> Beginning 7-1-92 the school shall make an identifiable effort to provide educational services to gifted and talented students, which are commensurate with their needs and foster a positive self-image.

The Administrative Code Committee felt that the aforementioned rule was in contravention of Section 20-7-902(1), MCA, which provides:

> A school district may identify gifted and talented children and devise programs to serve them." (emphasis added).

The Board would not change its rule. Thereafter, at the request of the Administrative Code Committee, the 1991 legislature passed House Bill 116 which states as follows:

> Whereas, the Legislature, not the Executive Branch, is the lawmaking branch of the state government under the Montana Constitution; and
>
> Whereas, the Legislature may delegate its power to

pass laws to the Executive Branch, which may then, within certain limits, adopt administrative rules that have the force and effect of law; and

Whereas, a rule may not conflict with a statute and is invalid if it does; and

Whereas, Section 20-7-902(1), MCA, provides that "a school district may identify gifted and talented children and devise programs to serve them" and Rule 10.55.804 ARM mandates a gifted and talented children program in each school, thereby directly and clearly conflicting with the statute; and Whereas, the Legislature has made a gifted and talented children program discretionary, at the choice of each local school board, the Legislature nonetheless affirms its support of gifted and talented education and encourages local school districts to identify gifted and talented students and design and implement programs that meet the needs of those students.

Be it enacted by the legislature of the State of Montana:

Section 1. Repealer. Rule 10.55.804, ARM, is repealed.

Section 2 Effective Date. This Act is effective July 1, 1991.

The Board felt that it had the authority to promulgate the aforementioned rule pursuant to the Article X, Section 9(3)(a), of the Montana Constitution of 1972, which provides:

There is a **board** of **public** education to exercise general supervision over the public school system and such other public educa-tional institutions as may be assigned by law. Other duties of the board shall be provided by law.

The Board brought the instant declaratory judgment action seeking a ruling as follows:

1. The legislative branch is not the sole law-making, or rule-making body under the Montana Constitution. Rather, the **Board** of **Public** Education, in exercising its Art. X Sec. 9(3) powers of "general supervision" has constitutional rule-making authority. This provision is self-executing and the authority granted is independent of any power that is "delegated" to the Board by the legislature.

2. The Board's accreditation stan-dards, including the rule mandating gifted and talented programs, are within the purview of its Art. X Sec. 9(3), constitu-tional powers of "general supervision".

3. That House Bill 116 and/or 20-7-902 MCA, to the extent they interfere or con-flict with the Board's constitutional rule-making are in violation of the separation of powers doctrine of Art. III Sec. 1 of the Montana Constitution and are therefore invalid and of no legal effect.

STANDARD OF REVIEW

Before reviewing the factual matter in particular, it would be helpful to review the standard that this Court will use in granting a motion for summary judgment. As all are aware, this Court cannot grant a motion for summary judgment if a genuine issue of material fact exists. Rule 56, M.R.Civ.P. Summary judgment encourages judicial economy through the elimi-nation of

unnecessary trial, delay, and expense. Wagner v. Glasgow Livestock Sale Co., 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986); Clarks Fork National Bank v. Papp, 215 Mont. 494, 496, 698 P.2d 851, 852-853 (1985); Bonawitz v. Bourke, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977).

Summary judgment, however, will only be granted when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), M.R.Civ.P.; Cate v. Hargrave, 209 Mont. 265, 269, 689 P.2d 952, 954 (1984). The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. Kober & Kyriss v. Billings Deac. Hosp., 148 Mont. 117, 417 P.2d 476 (1966).

The opposing party must then come forward with substantial evidence that raises a genuine issue of material fact in order to defeat the motion. Denny Driscoll Boys Home v. State, 227 Mont. 177, 179, 737 P.2d 1150, 1151 (1987). Such motions, however, are clearly not favored. "[T]he procedure is never to be a substitute for trial if a factual controversy exists." Reaves v. Reinbold, 189 Mont. 284, 288, 615 P.2d 896, 898 (1980). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. Rogers v. Swingley, 206 Mont. 306, 670 P.2d 1386 (1983); Cheyenne Western Bank v. Young, 1 Mont. 492, 587587 P.2d 401 (1978); Kober at 122, 417 P.2d at 479.

Clearly, summary judgment is appropriate since there is no disputed question of fact, as has been acknowledged by both parties.

This Court is of the view that the Board's motion should be granted.

IMMUNITY

The parties have done an heroic effort of briefing the Court on the question of whether or not the Administrative Code Committee has immunity from the present action. This Court feels, however, that the immunity issue need not be addressed or decided in order to resolve this matter. The Court has before it the State of Montana as a defendant. Clearly, the Board is entitled to have House Bill 116 tested before a Court. Perhaps the Administrative Code Committee is not the appropriate defendant. Clearly, however, the State of Montana is an appropriate defendant in such an action. Thus, in order to avoid the question of whether or not the Administrative Code Committee is immune, the Court will dismiss the Administrative Code Committee from this suit. This, however, still leaves the question of whether or not House Bill 116 improperly interfered with the Board's constitutional authority.

CONSTITUTIONALITY OF H.B. 116

The Court has been directed to a West Virginia case that is very persuasive. See West Virginia Board of Education vs. Hechler, 376 S.E.2d 839 (West Virginia 1988). In that case, the Supreme Court of West Virginia noted that Article XII, Section 2, of the West Virginia State Constitution provided:

> The general supervision of the free schools of the state shall be vested in the West Virginia Board of Education which shall perform such duties as may be

prescribed by law.
Id. at 842.

Pursuant to that Constitutional enactment, the West Virginia Board of Education adopted rules concerning design and equipment of school buses. The board filed their rule with the West Virginia secretary of state for publication. However, the secretary of state of West Virginia refused to file the rule because the Board had failed to first submit the rule to a legislative oversight committee. The West Virginia Supreme Court held that any attempt to impede rules proposed by the West Virginia Board of Education was not consistent with the general supervisory powers conferred upon the board by the West Virginia constitution.

The West Virginia court noted that state legislators, since they infrequently meet, cannot assume supervisory responsibility for public schools. In such cases, the supervision and administrative control over the state school system is placed in a State Board of Education. Decisions that pertain to education should be faced by those who possess expertise in the educational area. Id. at 842.

The West Virginia court noted that the Board of Education enjoyed a special standing due to its placement in the West Virginia Contitution. The Supreme Court of West Virginia held that the particular rule-making by the State Board of Education was within the meaning of general supervision of state schools as announced by the West Virginia Constitution, and that any statutory provision that interfered with such rule-making was unconstitutional. Id. at 843.

This is precisely the situation presented before this Court. In the first instance, the West Virginia constitutional provision in question in Hechler is very similar to Article X, Section 9(3), of the Montana Constitution. As in Hechler, we here have a situation where the Montana legislature is interfering with the rule-making authority of a constitutionally created Board of Education. This being the case, that statutory interference is unconstitutional.

The Montana Constitution provides:

> The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

See Montana Constitution, Art. III, sec. 1.

This Court is cognizant of the fact that there must be balancing between the powers of the legislature and those of special boards created by Montana's Constitution. This balancing was discussed in detail in the case of Board of Regents vs. Judge, 168 Mont. 433, 543 P.2d 1323 (1975). However, in this case, this Court is convinced that the rule here in question, as adopted by the Board, is well within its constitu-tional prerogative to exercise general supervision over the public school system.

In its brief, the State of Montana has delved extensively into comments made by delegates to the 1972 constitutional convention. However, if the language of the Constitution is clear, it may not be ignored. Further, if the language is clear, its meaning is to be ascertained from the Constitution itself construing the language as written. This being the case, there

is no occasion for construction since the language is plain and unambiguous. See General Agriculture Corporation v. Moore, 166 Mont. 510, 516, 534 P.2d 859 (1975).

Further, the State notes that the rule, as originally suggested by the Board, was allegedly drafted pursuant to statutory authority and not pursuant to the Constitution. Thus, argues the State, the Board cannot now seek to use the Constitution to support the passage of the rule. With this contention this Court cannot agree. The Board is a constitutionally recognized and created agency. As such, it is not subject to the usual administrative and legislative constraints to which the State refers. For example, it matters not that the Board may or may not have precisely complied with the Montana Administrative Procedure Act in adopting the rule in question. That Act is enacted by the legislature. As noted earlier, the legislature cannot interfere with other constitutionally created bodies that are properly conducting their business.

Further, the State points to the Attorney General's opinion contained at 44 Op. Att'y Gen. No. 4. However, that opinion expressly indicated that it was not dealing with any constitutional power of the Board.

The State exalts form over substance and would require the Board to perform a meaningless act. The State seems to be contending that one of the reasons this rule is invalid is that the Board did not follow precise administrative procedures. Thus, argues the Board, if the Board did follow these precise administrative procedures, and indicated that the rule was not being adopted pursuant to a statute but pursuant to the Constitution, then perhaps the rule would be valid. This Court considers such a procedure to be a futile act. This Court will not require the Board to go through such a futile procedure. Perhaps that argument would be well taken if we were here dealing with a board or agency created by another branch of government. However, we are dealing with a constitutionally-empowered board.

Based on the above, the Court hereby enters its declaratory ruling as follows:

The **Board** of **Public** Education, pursuant to Article X, Section 9(3), of the Montana Constitution, is vested with constitutional rule-making authority. This provision is self-executing and independent of any power that is delegated to the Board by the legislature. The Board's rule mandating gifted and talented programs is within the purview of the Board's constitutional power of general supervision pursuant to Article X, Section 9(3), of the Montana Constitution. House Bill 116, to the extent that it interferes or conflicts with the Board's constitutional rule-making power, is in violation of the separation of powers doctrine of Article III, Section 1, of the Montana Constitution, and is therefore invalid and of no further force or effect.

DATED this _____ day of March, 1992.

s/JUDGE **SHERLOCK**

pc: W. William Leaphart
Eddye McClure
Judy Browning

DOCUMENT B

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OFFICE OF PUBLIC INSTRUCTION
STATE OF MONTANA

Putting Montana Students First A+

MEMORANDUM

To: **Elsie Arntzen, Superintendent of Public Instruction**
Sharon Carroll, Chairperson, Montana Board of Public Education

Cc: **Robert Stutz, Assistant Attorney General, Agency Legal Services Bureau**

From: **Kyle Moen, Chief Legal Counsel, Montana Office of Public Instruction**

Re: **Negotiated Rulemaking for Admin. R. Mont. 10.56.101**

Date: **29 June 2018**

I. Introduction and Subject of this Memorandum

The purpose of this Memorandum is to analyze the question of whether the Superintendent of Public Instruction (SPI) is required by law to develop recommended changes to Admin. R. Mont. 10.56.101, Student Assessment, through the negotiated rulemaking process as part of the Accreditation Standards as contemplated in Mont. Code Ann. § 20-7-101. The Office of Public Instruction (OPI) is proposing to amend Admin. R. Mont. 10.56.101 in response to changes in federal requirements and the results of the ongoing peer-review process for Montana's state assessments. The OPI has begun the negotiated rulemaking process, but is receiving questions regarding this decision with concerns that the SPI lacks legal authority to convene a negotiated rulemaking committee for the proposed amendments, or in the alternative that the SPI is not required to and that doing so would be inappropriate. This Memorandum analyzes the statutory and regulatory language implicated by the question and reaches the conclusion that the SPI is required to utilize the negotiated rulemaking process for proposing changes to Admin. R. Mont. 10.56.101.

II. The Statute in Question

By way of history, during the 2015 Legislative Session, then-Senator, now-Superintendent Elsie Arntzen sponsored Senate Bill 345 (SB 345). SB 345 was passed out of both houses and was signed by Governor Bullock on April 30, 2015. It became effective upon passage and approval. Among other changes, SB 345 amended Mont. Code Ann. § 20-7-101 to its current form, requiring that any changes to the standards of accreditation recommended to the BPE by the SPI be developed through the negotiated rulemaking process found in Title 2 of the Montana Code Annotated. The statute is reproduced in its entirety below:

> **20-7-101. Standards of accreditation.**
> (1) Standards of accreditation for all schools must be adopted by the board of public education upon the recommendations of the superintendent of public instruction. The

superintendent shall develop recommendations in accordance with subsection (2). The recommendations presented to the board must include an economic impact statement, as described in 2-4-405, prepared in consultation with the negotiated rulemaking committee under subsection (2).

(2) The accreditation standards recommended by the superintendent of public instruction must be developed through the negotiated rulemaking process under Title 2, chapter 5, part 1. The superintendent may form a negotiated rulemaking committee for accreditation standards to consider multiple proposals. The negotiated rulemaking committee may not exist for longer than 2 years. The committee must represent the diverse circumstances of schools of all sizes across the state and must include representatives from the following groups:

(a) school district trustees;
(b) school administrators;
(c) teachers;
(d) school business officials;
(e) parents; and
(f) taxpayers.

(3) Prior to adoption or amendment of any accreditation standard, the board shall submit each proposal, including the economic impact statement required under subsection (1), to the education interim committee for review at least 1 month in advance of a scheduled committee meeting.

(4) Unless the expenditures by school districts required under the proposal are determined by the education interim committee to be insubstantial expenditures that can be readily absorbed into the budgets of existing district programs, the board may not implement the standard until July 1 following the next regular legislative session and shall request that the same legislature fund implementation of the proposed standard.

(5) Standards for the retention of school records must be as provided in 20-1-212.

At first glance, it may appear that the SPI is indeed not required to engage in the negotiated rulemaking process to propose an amendment to Admin. R. Mont. 10.56.101. After all, the rule's title is "Student Assessment" and it is in Chapter 56, the "Assessment" chapter of the education rules, rather than Chapter 55, which is the "Standards of Accreditation" chapter. However, a closer inspection of the relevant rules and statutes arguably yields a different conclusion.

III. The Statutory Definition of "Accreditation Standards"

First and foremost, statutory interpretation appropriately starts with a review of the plain language of the text. This process is aided in this instance by technical definitions being supplied by the Montana Legislature in Mont. Code Ann. § 20-1-101, Definitions. That statute, under subsection 1, establishes the definition of "Accreditation standards" that will prevail in all of Title 20 "unless the context clearly indicates otherwise." The Legislature has defined "accreditation standards" as:

(1) ... the body of administrative rules governing standards such as:
(a) School leadership;

(b) Educational opportunity;
(c) Academic requirements;
(d) Program area standards;
(e) Content and performance standards;
(f) School facilities and records;
(g) Student assessment; and
(h) General provisions.

As can be seen, Mont. Code Ann. § 20-1-101(1)(g) explicitly names the body of administrative rules governing standards of student assessment as falling under the accreditation standards. A cursory review of the above Mont. Code Ann. § 20-7-101, *supra*, will note that there is no clear indication that the Legislature did not intend the above definition to apply to that section. This means that the rules governing student assessment likely fall under the statutory requirement that the SPI convene a negotiated rulemaking committee.

IV. The Structure of Admin. R. Mont. 10.56.101

Another compelling reason to believe that the assessment rules constitute part of the accreditation rules is the authorizing text of Admin. R. Mont. 10.56.101 itself, reproduced here in relevant part:

> (1) By the authority of 20-2-121(12), MCA and ARM 10.55.603, the Board of Public Education adopts rules for state-level assessment in the public schools and those private schools seeking accreditation.
>
> (2) The board recognizes that the primary purpose of assessment is to serve learning. A balanced assessment system including formative, interim, and summative assessments aligned to state content standards will provide an integrated approach to meeting both classroom learning needs and school and state level information needs. A balanced assessment system is structured to continuously improve teaching and learning and to inform education policy.
>
> (3) In order to obtain state-level achievement information, all accredited schools shall annually administer a single system of state-level assessments approved by the board. The following state-level assessments shall be administered according to standardized procedures. Districts and schools shall ensure that all test administrators are trained in and follow those procedures.
>
> ...

The very first sentence of the rule directly invokes the Standards of Accreditation as authorizing the creation of the rule and tying it directly to accreditation requirements. It also includes in (3) a mandate that "all accredited schools shall annually administer [state-level assessments]" and "ensure that all test administrators are trained [according to standardized procedures.]"

Even if it is not placed in Chapter 55, Admin. R. Mon. 10.56.101 clearly has a direct impact on the requirements schools must meet to achieve and maintain accreditation. It is indeed arguably incorpo-

rated by cross-reference into Admin. R. Mont. 10.55.603, Curriculum and Assessment, which references it directly in two different locations as where in the Administrative Rules of Montana districts ought to look to ensure compliance with the some of the Standards of Accreditation:

> ...
>
> (3) School districts shall assess the progress of all students toward achieving content standards and content-specific grade-level learning progressions in each program area. The district shall use assessment results, including state-level achievement information obtained by administration of assessments pursuant to ARM 10.56.101 to examine the educational program and measure its effectiveness.
>
> ...
>
> (5) ...
>
> > (b) School districts shall use appropriate multiple measures and methods, including state-level achievement information obtained by administration of assessments pursuant to the requirements of ARM 10.56.101, to assess student progress in achieving content standards and content-specific grade-level learning progressions in all program areas.

The rules are in direct contact with each other. This cross-referencing means that failure to follow the dictates of Admin. R. Mont. 10.56.101 could lead to findings of accreditation deviations under Admin. R. Mont. 10.55.603. That one is a standalone rule in a standalone chapter separate from Chapter 55 may not carry much weight given how interwoven the rules are and the potential consequences for non-compliance.

V. The Board of Public Education as a Constitutionally-Empowered Body

Concerns voiced by some in the education community regarding this decision seem to assert that the BPE, as a constitutionally-created body with general supervisory authority over Montana's public schools, does not need the Legislature involved in determinations regarding student assessment.

> Dear Elsie:
>
> MT-PEC does not believe your evolving negotiated rulemaking process re student assessment is necessary nor appropriate.
>
> We believe the Montana constitution, two supreme court decisions, and the legislature all affirm that the board of public education has general supervision of Montana's public schools. To our knowledge the legislature has never been involved in student assessments. It should not be involved now.
>
> We urge your office to pursue a less formal and effective way to engage the Montana public school community on rule proposals.
>
> //

Thank you for your consideration.

MT-PEC
June 4, 2018, e-mail sent to Superintendent Arntzen by Eric Feaver, President of the Montana Federation of Public Employees, on behalf of MT-PEC

This message from MT-PEC appears to be based on a concern that the Legislature may insert itself into the determination of what the proper assessments are for Montana students. This concern has been expressed by others as well. This concern misunderstands the power of the Legislature's participation in the negotiated rulemaking process at this juncture, as well as how the Legislature's power pertains to the powers and duties of the SPI (more on that in Section VI, *infra*).

Under the requirements of Mont. Code Ann. § 20-7-101, the Legislature has two options when presented by the BPE with a proposed rule change: make a determination that the proposal will require insubstantial expenditures on the part of school district budgets, or do not make such a determination. If no such determination is made, the BPE is prohibited from implementing the proposed rule until the July 1 following the next legislative session to afford the Legislature the opportunity to provide additional school funding to offset the budget expenditures districts will be required to absorb to comply with the new rule. The BPE is also required to request such funding. Regardless of whether the Legislature provides the funding the Education Interim Committee finds may be necessary, the BPE is free to implement the rule beginning on July 1.

The BPE absolutely has constitutional rulemaking power, and this statute may put the Legislature on a collision course with the BPE on that matter,[1] but to the extent that the Legislature may be infringing upon that power by requiring the BPE to give the Legislature an opportunity to examine proposed rule changes and to delay their implementation, that concern is not unique to engaging the negotiated rulemaking process for Admin. R. Mont. 10.56.101. Nor would excluding the Legislature from this process prevent it from taking up the issue on its own this coming January if it were unhappy with the outcome of the rulemaking. Lastly, as outlined above, the Education Interim Committee is not permitted to make a finding that a proposed rule may constitute bad policy, and thus delay implementation; its jurisdiction at this point is limited purely to the economics of implementing the proposed rule.

VI. Who Does the Statute Require to Engage in the Negotiated Rulemaking Process?

Another wrinkle in the way Mont. Code Ann. § 20-7-101 is written is that the fact that the constitutional power of the BPE is implicated in (3) does not have any real effect on the requirement in (2) that the SPI engage in the negotiated rulemaking process. Even if the BPE asserts its constitutional power and elects to implement a rule without presenting it to the Education Interim Committee, or implements it prior to July 1 even after there is no finding of insubstantial economic impact, that all happens *after* the SPI has been required by law to convene a negotiated rulemaking committee to assist the SPI in the proposal the BPE ultimately acts on. Simply put, the BPE is not the state entity required by the statute to create the negotiated rulemaking committee—the SPI is, and the SPI's powers and duties are those provided in law. Constitution of the State of Montana, Article VI, Section 4(5).

[1] As an aside, the Legislature could potentially avoid that fight by amending (3) of that statute to require the SPI to bring the proposed rule to the Education Interim Committee prior to recommending it to the BPE, rather than ordering the BPE to bring the rule to the committee. The SPI, unlike the BPE, lacks constitutional power in this arena and must generally abide by the will of the Legislature.

Because both the Legislature and the BPE can create laws apportioning powers and duties to the SPI, to the extent possible, the SPI must attempt to find interpretations of law that keep concert between dictates of the Legislature *and* those of the BPE or risk non-compliance with one or the other.

VII. What About the 2016 Amendments to Chapter 54 of the Administrative Rules of Montana?

Of interesting historical value is the fact that the OPI recently went through a full negotiated rulemaking process to amend Chapter 54 of the Administrative Rules. These rules are also set apart from the Standards of Accreditation in Chapter 55, but to the best of the agency's recollection, no concern appears to have been raised by the BPE or MT-PEC regarding that negotiated rulemaking process, though the arguments advanced now would seem to be equally applicable to those rules. It is worth remarking upon the fact that BPE Executive Director was a negotiated rulemaking committee member during these Chapter 54 amendments.

There is one notable difference between Chapter 54 and Chapter 56: in the citations to authority at the bottom of the Chapter 54 rules, the BPE does reference Mont. Code Ann. § 20-7-101 while Admin. R. Mont. 10.56.101 does not. However, given that the BPE cross-references Admin. R. Mont. 10.55.603 with Admin. R. Mont. 10.56.101 multiple times (as discussed in Section IV, *supra*), that may be of negligible value. One important thing that the Chapter 54 and Chapter 56 rules have in common, though, is that both subject matters are defined by the Legislature as falling under accreditation standards at Mont. Code Ann. § 20-1-101(1)(e) and (g), *supra*.

VIII. What About the 2016 Amendment to Admin. R. Mont. 10.56.101?

An observer of the administrative rulemaking process may note that Admin. R. Mont. 10.56.101 was amended in 2016, after Mont. Code Ann. § 20-7-101 came into its current form. This rule change did not go through the negotiated rulemaking process. The rationale for that is simple, and consistent with the OPI's position articulated to date—the statute did not apply because the BPE was the driving force behind those rule changes. The SPI did not recommend those changes to the BPE and thus the negotiated rulemaking requirement was not triggered. See in part the analysis in Section V, *supra*, on the BPE's constitutional authority as it pertains to Mont. Code Ann. § 20-7-101.

IX. What is the Best Argument that the SPI Does Not Need to Convene a Negotiated Rulemaking Committee for these Proposed Amendments?

The best argument that a negotiated rulemaking committee is unnecessary at this time is tied to the BPE's constitutional authority, discussed in Section V, *supra*. The SPI could assert that the decision to carve out Assessment into its own chapter of the Administrative Rules, leaving it outside of the Standards of Accreditation chapter, was the result of a deliberate effort to separate the two. As such, one may argue, the BPE's decision to keep them separate constitutes a choice to diverge from the Legislature's determination that they be clustered together, and should be given deference by the agency, since the BPE's constitutional authority over education generally trumps the Legislature's when there is a conflict.

That last part is important, however. One of the most commonly-accepted canons of construction when courts are looking to interpret statutes and regulations is the principle that if two laws can be

interpreted to be harmonious, they ought to be. If the OPI advances this argument in defense of a decision to not utilize negotiated rulemaking it will face two large hurdles: the separation predates the statutory definition and the definition has existed in its current form for 13 years.

During the 2005 legislative session, Senator Don Ryan introduced Senate Bill 152 (SB 152). SB 152 was passed out of both houses and was signed by Governor Schweitzer on April 7, 2005. It became effective upon passage and approval. Part of SB 152 amended the definitions in Title 20 found at Mont. Code Ann. § 20-1-101 to add a definition for accreditation standards, reproduced in Section III, *supra*. The definition has not been amended since its creation. If the BPE wished to assert that it has an issue with that definition and wants to argue that it implicitly repealed it, the BPE would likely face the question of why this is the first time it is bringing up the issue since the definition's creation more than 13 years ago. Notably, the BPE's definition section for its own accreditation rules, Admin. R. Mont. 10.56.602, does not actually address what constitutes a standard of accreditation (but, interestingly, does define "Assessment"). It is silent on the question, whereas the Legislature has clearly asserted its position.

The second problem with arguing that creating Admin. R. Mont. 10.56.101 separately from Admin. R. Mont. 10.55.603 was a deliberate choice to counter the Legislature's action is the creation dates of those rules. Administrative Rule of Montana 10.55.603 was created in 1989, and, in fact, Admin. R. Mont. 10.56.101 was created the year prior, in 1988. Both rules, and thus the "carve-out," pre-date the Legislature's decision to define accreditation standards by more than fifteen years. The OPI's Legal Division has searched for any history on the original creation of the two rules and cannot locate any. Absent clear articulation in the record explaining why these rules were created in this way, a court may look with disfavor upon an interpretation that set up a constitutional conflict between the BPE and the Legislature.

X. Negotiated Rulemaking Authority in General

Even if the Superintendent is not *required* to go through the negotiated rulemaking process to propose amendments for Admin. R. Mont. 10.56.101, the SPI is still authorized to conduct a negotiated rulemaking process pursuant to Mont. Code Ann. § 2-5-104, reproduced below:

> **2-5-104. Determination of need for negotiated rulemaking committee.**
> (1) An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the agency director determines that the use of the negotiated rulemaking procedure is in the public interest. In making that determination, the agency director shall consider whether:
>
> (a) there is a need for a rule;
>
> (b) there are a limited number of identifiable interests that will be significantly affected by the rule;
>
> (c) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:
>
> (i) can adequately represent the interests identified under subsection (1)(b); and
>
> (ii) are willing to negotiate in good faith to reach a consensus on the proposed rule;
>
> (d) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

(e) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;

(f) the agency has adequate resources and is willing to commit those resources, including technical assistance, to the committee; and

(g) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee as the basis for the rule proposed by the agency.

(2) An agency may use the services of a convener to assist in making the determination of need pursuant to subsection (1) and to assist the agency in:

(a) identifying persons who will be significantly affected by a proposed rule; and

(b) conducting discussions with affected persons on the issues of concern and ascertaining whether the establishment of a negotiated rulemaking committee is feasible and appropriate for the particular rulemaking procedure.

(3) The convener shall report findings and make recommendations to the agency. Upon request of the agency, the convener shall ascertain the names of persons who are willing and qualified to represent the interests that will be significantly affected by the proposed rule. The report and any recommendations of the convener must be made available to the public upon request.

This statute would allow the SPI, as an agency director, to find that convening a negotiated rulemaking committee on assessment is in the public interest, and thus create one. An important difference, and perhaps one of great importance to some of the concerned parties, is that if this is the process invoked for the negotiated rulemaking rather than the process in Title 20, there would be no required presentation of the proposed rule to the Education Interim Committee.

XI. Conclusion

It is my position, based on the information I have been able to locate to date, that the SPI is required to go through the negotiated rulemaking process as outlined in Mont. Code Ann. § 20-7-101 in order to propose changes to Admin. R. Mont. 10.56.101. The Legislature's clear language in this regard almost certainly rebuts an argument that the BPE has implicitly repealed the definition of accreditation standards located at Mont. Code Ann. § 20-1-101. Furthermore, given the SPI's duty to adhere to both statutes and rules as much as possible, the prudent course of action in this case is probably to read the BPE's rules and the Legislature's statutes to not be in conflict on this issue, and to accordingly proceed with the negotiated rulemaking process.

DOCUMENT C

Montana Board of Public Education
Executive Summary

Date: July 2018

Presentation	Discussion of Student Assessment Rules
Presenter	Ashley McGrath
Position Title	NAEP State Coordinator
Overview	The Office of Public Instruction (OPI) will present an overview of the federal statute, federal findings, and future transitions which have been instrumental in guiding the directions with the student assessment negotiated rulemaking committee. This update will cover: • Discuss suite of six assessments. • Share ESSA assessment and accountability musts. • Share current assessment rules, historical reflections, and future plans. • Share science transition timeline. • Provide evidence behind proposed rule amendments including ESSA, Peer Review, Title I Audit, and Science Transition. • Summarize student assessment themes. • Share next steps and information on Committee appointments.
Requested Decision(s)	Information Item
Related Issue(s)	Student Assessment Negotiated Rulemaking Committee
Recommendation(s)	None

Discussion of Student Assessment Rules

Strategic Planning Meeting

Ashley McGrath

July 11, 2018

Agenda

- Discuss suite of six assessments.
- Share ESSA assessment and accountability musts.
- Share current assessment rules, historical reflections, and future plans.
- Share science transition timeline.
- Provide evidence behind proposed rule amendments including ESSA, Peer Review, Title I Audit, and Science Transition.
- Summarize student assessment themes.
- Share next steps and information on Committee appointments.

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Suite of Statewide Assessments

Montana's Six Single Statewide Systems

Subject	Elementary (K-5)	Middle (6-8)	High (9-12)
Math	Smarter Balanced & Multi-State Alternate Assessment		ACT with Writing & MSAA
Reading/ Language Arts			
Science	CRT-Science & CRT-Science Alternate		
English Language Proficiency	ACCESS for ELLs		

ESSA Requirements

ESSA Musts:

- Annually assess all students in specific grade/subject combinations
- Be aligned to challenging academic content standards
- Be equitable for all students
- Notify parents about testing

ESSA Accountability

Accountability Musts:

- Establish student academic achievement levels
- Implement high-quality academic assessments aligned with standards to provide coherent and timely information about students' attainment of such standards
- Provide individual student reports to parents, teachers and principals
- Include results on State and local report cards

ESSA Accountability Cont…

Accountability Musts:

- **Accountability indicators and uses**
  - Academic Achievement
  - Academic Growth
  - English Learner Progress
  - Long-term and Interim Goals
  - STEM

- **Participation Minimums**
  - 95% of all students
  - 95% of student subgroups
  - 1% of students assessed with alternate

Historical Reflections and Future Plans

1965
- President Johnson passed the landmark Elementary and Secondary Education Act (ESEA).

1994
- US DOE requires states to have statewide assessment systems.

2000
- US DOE conducts its first set of peer review for state assessment systems.

2001
- No Child Left Behind (NCLB) signed into law by President Bush.
- Title I required each state to develop or adopt a set of student assessments in at least reading/language arts and mathematics.
- This expanded the role of standardized testing requiring students in Grades 3 through 8 be tested annually.

2002
- Montana was put on a Title I Compliance Agreement.
- Agreement illustrated the Iowa Test of Basic Skills (ITBS) at Grades 4, 8 and 11 wasn't sufficient to comply with the federal standards.

2003
- Transition from Iowa Basics to MontCAS CRT began.

…

2021
- *Operational Test in Grades 5, 8 and once in HS.

Current 10.56.101 Student Assessment Rules

- Current 10.56.101 includes nine rules
- Statewide assessment touches many areas and programs
- Last revision occurred on **August 6, 2016**
  - Revision included the addition of rule 9 and the removal of some transitional language
  - Current rules do not necessarily reflect the needs of ESSA, Peer Review, Title I Audit, and Transition

Science 5-Year Transition

*TBD - Future

2016

- New Science Standards Adopted

2017

- Science Standards Implemented
- CRT-Science Contract Extended (Two Years)

2018

- Begin Rule Review and Revisions
- Begin Competitive Bid Plans
- Begin Transition Communication Plans

Parallel Planning for Science

2019

- *Updated Rules in Place
- *CRT-Science Contract Expired; RFP Issued
- *Transition Started

2020

- *Census Field Test in Grades 5, 8 and once in HS

2021

- *Operational Test in Grades 5, 8 and once in HS

Rationale for Rule Proposals

- Rationale for rule proposals stem from history with ESSA, Peer Review, Title I Audit, and Science Transition.
  - **Comply** with federal guidance
  - **Address** assessment transition challenges
  - **Respond** to test security and monitoring findings from Peer Review and Title I Audit

PEER REVIEW | 30 CRITICAL ELEMENTS

Critical Elements (CE) are categorized into six sections:

- (CE 1): Statewide System of Standards and Assessments
- (CE 2): Assessment System Operations
- (CE 3): Technical Quality – Validity
- (CE 4): Technical Quality – Other
- (CE 5): Inclusion of All Students
- (CE 6): Academic Achievement Standards and Reporting

Source: Peer Review 2015 Guidance

CE 2.5 - Test Security Peer Review Example

State peer review under the Department, peers noted four criteria for improving test security within the State's assessment system:

- **Prevention**
  - Peers could not find evidence that there were **clear consequences** for confirmed violations of test security (i.e. State law, State regulations or State Board-approved policies).
- **Detection**
  - Peers could not find policies and procedures for the **detection of test irregularities.**
- **Remediation**
  - Peers could not find policies or procedures for **remediation following test security incidents.**
- **Investigation**
  - Peers could not find policies or procedures for **investigation for alleged or factual test irregularities.**

Source: Peer Review 2018 Feedback

Title I Audit

Under Title I within the Department, States are encouraged to take the following steps:

- **Conduct** a **risk analysis** of district- and school-level capacity to implement **test security** and **data-quality procedures**.
- **Ensure** assessment development contracts **include support** for activities related to **monitoring test security**.
- **Conduct** unannounced, on-site visits during test administration to review compliance with professional standards on test security.
- **Seek** support to **enact strict** and **meaningful sanctions** against individuals who transgress the law or compromise professional standards of conduct.

Source: Letter to Chiefs June 24, 2011

Proposed Rule Amendments

- **Rule proposals are organized by these six themes:**

Participation	Test Administration	Accessibility and Accommodations	Transition	Test Security	Reporting

- Committee meets **Monday, August 6, 2018**
- Anticipate three meetings this fall and releasing the economic impact survey in October 2018
- Anticipate a recommendation to the Superintendent in December 2018
- Anticipate a recommendation to the Board in January 2019

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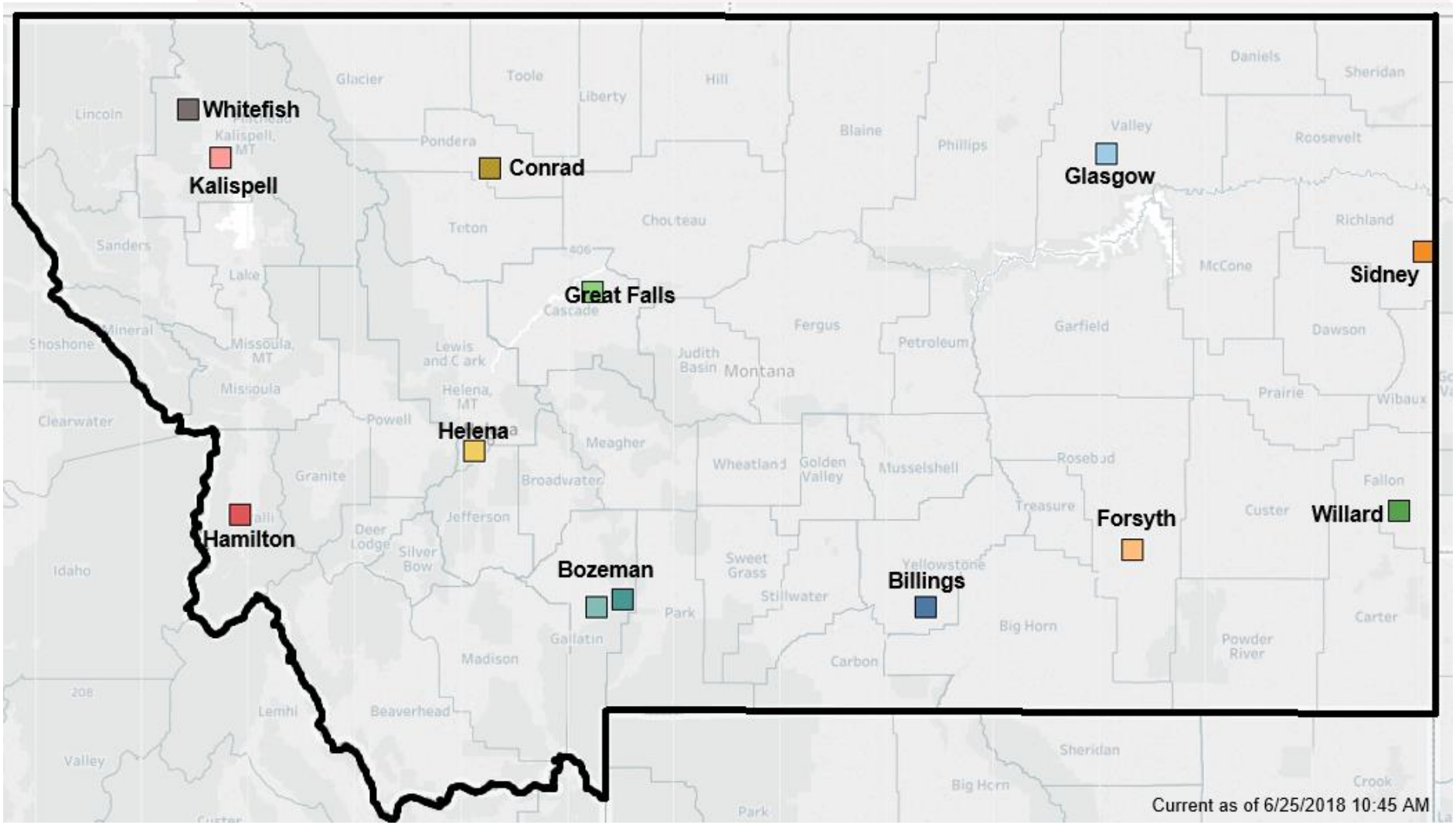
Geographic Representation for Student Assessment NR Candidates



Committee Information

- **OPI Web Site at opi.mt.gov >**
- **Leadership >**
- **Assessment & Accountability >**
- **Statewide Testing >**
- **Home Screen** towards bottom of page

To learn more about the Negotiated Rulemaking Committee for Student Assessment rules and process steps, please visit the Student Assessment Negotiated Rulemaking Committee page.

Questions?

Ashley McGrath

NAEP State Coordinator

Montana Office of Public Instruction

Phone: 406.444.3450

Email: amcgrath@mt.gov

Website: www.opi.mt.gov (Leadership > Statewide-Testing)

ITEM 2

DISCUSSION OF ARM 10.57.109 – UNUSUAL CASES

Pete Donovan

OPI Staff

State of Montana

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Helena, Montana 59620-0601
(406) 444-6576
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Board of Public Education

May 22, 2018

Superintendent Elsie Arntzen
Office of Public Instruction
1227 11th AVE
Helena MT 59601

Dear Superintendent Arntzen:

Recently the Board of Public Education has held hearings on several licensure appeals where OPI denied an educator's license application but recommended that BPE approve the license under ARM 10.57.109, the "unusual cases" rule. Although a recommendation for approval is the approach required by the rule, the recent recommendations have been made without prior, written notice to the Board that OPI would take that position. As a result, BPE prepares for a hearing on the merits of the licensure appeal but at the hearing is presented with the question of whether special circumstances justify licensure despite the merits of the appeal. Potentially, BPE's decision could be delayed to a subsequent meeting if OPI's position at the hearing was not previously disclosed and differed from the position taken in the denial of the license.

The simplest resolution may be for OPI to provide a written response stating the position it will take on the licensure appeal. For example, OPI's written response could state that: 1) it maintains the same position it held during the denial, 2) it has changed its position and will now grant the license, precluding the need for an appeal, 3) it is awaiting further information that may result in a grant of the license, or 4) it recommends that BPE grant the license as an unusual case under ARM 10.57.109. There also may be other positions OPI could take. The important point from a procedural perspective is that OPI notify BPE in writing of the position it will take on the licensure appeal.

If OPI agrees to provide written responses to future licensure appeals, please let me know. If not, please let me know your concerns about that approach so that BPE and OPI can work together to resolve this issue.

Regards,

Sharon Carroll

Sharon Carroll, Chair
Board of Public Education

Cc: Kyle Moen, Chief Legal Counsel, OPI
Kristine Thatcher, OPI

Elsie Arntzen, Superintendent
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OFFICE OF PUBLIC INSTRUCTION
STATE OF MONTANA

Putting Montana Students First A+

June 29, 2018

Chairperson Sharon Carroll
Board of Public Education
P.O. Box 200601
Helena, MT 59620

Dear Chairperson Carroll,

Thank you for your May 22, 2018, letter regarding the Board of Public Education's desire for a more streamlined and transparent process for appeals of denied licenses. As you know, I share this Board's desire for good government and am happy to provide assurances regarding that. In speaking with staff at the agency I believe that we can easily accommodate this Board's request.

It is my understanding that this Board would be satisfied in its request if, upon receipt of a notice of appeal of a licensure denial, my office submitted a brief reply to the notice advising the Board, and the appellant, of the posture of the agency relative to the applicant's appeal. The Office of Public Instruction will provide these position papers for future cases.

I would like to note, however, that there may be times when the OPI's position on such an appeal changes. Over the course of preparing for an appeal, it is not uncommon for the agency to come into possession of information that materially changes the agency's view of the underlying merits of a case. Should that occur, the OPI will endeavor to provide the Board with a timely update to its position, as well as an explanation for the change.

I look forward to discussing this matter with you and your Board further at the next meeting.

Sincerely,

Elsie Arntzen

Elsie Arntzen
State Superintendent of Public Instruction

10.57.109 UNUSUAL CASES

(1) The Board of Public Education is aware that these licensure rules cannot cover all the special circumstances that can arise. Therefore, the Board of Public Education is authorized to exercise judgment in unusual cases upon recommendation by the Superintendent of Public Instruction.

History: Mont. Const. Art. X, sec. 9, 20-4-102, MCA; IMP, Mont. Const. Art. X, sec. 9, 20-4-102, MCA; Eff. 4/21/75; ARM Pub. 11/25/77; AMD, 2014 MAR p. 2930, Eff. 7/1/15; AMD, 2016 MAR p. 2330, Eff. 1/1/17.