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FOR MONTANA'S PUBLIC SCHOOLS

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LEGAL MEMORANDUM

TO: Montana Board of Public Education
FROM: Coalition of Advocates for Montana's Public Schools
PREPARED BY: MTSBA Legal Staff
DATE: November 11, 2026

RE: OPI's Unauthorized De Facto Amendment of Accreditation Rubric A; Emergency Authorizations of Employment; Constitutional Allocation of Rulemaking Authority

I. Executive Summary and Formal Objection

The Coalition objects to the Office of Public Instruction's (OPI) newly asserted policy of assigning Rubric A accreditation deficiencies to districts solely because they employ educators pursuant to valid Emergency Authorizations of Employment (EAEs). This approach departs from the longstanding treatment of properly authorized emergency educators described by Montana districts, without a corresponding amendment to the controlling statutes or Board-adopted accreditation rules. It threatens to penalize districts for using the very emergency staffing mechanism Montana law prescribes.

OPI has effectively amended the Board of Public Education's accreditation rules without rulemaking authority, public notice, an opportunity for comment, or adoption of a new rule under MAPA.

The problem is not merely interpretive. The Board, not OPI, possesses the authority to adopt accreditation standards and determine accreditation status. OPI's role is to review compliance and make recommendations. MCA §§ 20-2-121(1), (6), 20-7-101, 20-7-102(1). OPI cannot use a staff opinion or scoring rubric to exercise the Board's rulemaking power.

II. The Board's Constitutional Authority: The 1992 Sherlock Decision

Article X, § 9(3)(a), Montana Constitution, entrusts the Board of Public Education with general supervision over the public school system. In Montana Board of Public Education v. Montana Administrative Code Committee, Cause No. BDV-91-1072 (Mont. First Jud. Dist. Ct., Lewis & Clark County, Mar. 1992) (Sherlock, J.), the court held that this provision confers self-executing constitutional rulemaking authority on the Board, independent of authority delegated by the Legislature. The court invalidated a legislative attempt, House Bill 116, to repeal the Board's gifted-and-talented accreditation rule as an impermissible interference with that constitutional authority.

The court's actual decision is reproduced in the Board's own Roles and Responsibilities compilation and its board-member handbook. This is a district court decision, not a Montana Supreme Court holding; its precise significance is that a Montana court has expressly recognized the constitutional independence of the Board's rulemaking authority. The reasoning

applies with particular force to an executive education office purporting to alter the effect of the Board's accreditation rules without the Board's action.

Sherlock also observed that the Board's constitutional rulemaking authority is not necessarily limited by every ordinary legislative procedural constraint, including MAPA. That observation protects the Board's independent constitutional status; it does not empower OPI to adopt, amend, or repeal Board rules. The Coalition's MAPA objection is directed at OPI's unpromulgated, generally applicable policy, not at the Board's constitutional capacity to act.

III. Statutory Allocation of Accreditation Powers

MCA § 20-2-121(1) places policies for teacher certification and emergency authorization within the Board's duties; subsection (6) directs the Board to adopt accreditation standards and establish the accreditation status of schools. MCA § 20-7-101 provides a process for the development and adoption of accreditation standards, including OPI recommendations and negotiated rulemaking. MCA § 20-7-102(1) provides that OPI reviews schools and recommends accreditation status, which the Board then establishes. These distinct responsibilities are not interchangeable.

The Legislature has not made OPI an alternate accreditation rulemaker. The Board's constitutional general-supervision authority and its express statutory duties leave no room for an OPI staff-level revision of the substantive criteria by which districts are judged. The Board must preserve its institutional prerogative against administrative displacement.

IV. The EAE Exception Has Deliberate Regulatory Meaning

MCA §§ 20-4-101 and 20-4-111 recognize emergency authorization as a lawful route for specified instructional employment when ordinary recruitment fails. ARM 10.57.107 requires substantial district recruitment and eligibility documentation. The district requests the authorization; the authorization identifies a particular individual, assignment, and period. It is not an ordinary teaching license, but it is an affirmative state authorization for the employment in question.

ARM 10.55.602(30) expressly excludes persons with an EAE under MCA § 20-4-111 from the definition of “nonlicensed.” ARM 10.55.602(51) includes them within the definition of “teacher.” OPI responds that “nonlicensed” appears nowhere else in Chapter 55. That is not a legal basis to erase the Board's express exception. The ordinary meanings of “nonlicensed” and “unlicensed” describe the same absence of a license; OPI cannot evade the exception by switching prefixes or invoking a rubric label.

OPI’s claim that the defined term “nonlicensed” does not appear elsewhere in Chapter 55 is demonstrably incorrect. ARM 10.55.716, a substantive Board-adopted accreditation rule governing substitute teachers, repeatedly uses that exact term. Subsections (2) and (3) impose training and minimum educational requirements on “nonlicensed substitute teacher[s],” while subsection (4) imposes fingerprint-based background-check requirements on districts employing them. The Board’s definition in ARM 10.55.602(30) therefore has an operative application within Chapter 55; it is not a dormant or meaningless definition.

More significantly, ARM 10.55.716(1)(b) expressly distinguishes a “licensed or authorized teacher” and directs districts, when a licensed teacher cannot be obtained for an extended absence, to pursue employment of a teacher authorized under ARM 10.57.107. The Board thus used “nonlicensed” as a regulatory category while separately acknowledging authorized instructional employment under an emergency authorization. OPI cannot dismiss the definition as unused, then collapse the Board’s express EAE exception into the rubric’s unqualified label “unlicensed” when the Board’s own rules specifically separate EAE from unlicensed individuals.

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Emergency-Authorized Individuals Are "Authorized Teachers" Under the Board's Own Accreditation Rules

The Board of Public Education has expressly recognized the legal status of an "authorized teacher" as distinct from a "licensed teacher." ARM 10.55.716(1)(b) refers to a "licensed or authorized teacher" and expressly directs school districts, when a licensed teacher is unavailable, to pursue employment of a teacher authorized under ARM 10.57.107.

This language is decisive evidence that the Board recognizes emergency authorization as a legally sufficient basis for instructional employment in circumstances governed by the emergency authorization framework. The distinction is deliberate: the Board did not merely refer to licensed teachers; it expressly included authorized teachers and cross-referenced the very administrative rule governing emergency authorizations of employment.

ARM 10.55.602(51) reinforces this conclusion by expressly including persons employed pursuant to MCA 20-4-111 within the definition of "teacher." ARM 10.55.602(30) further reinforces the distinction by excluding individuals holding emergency authorizations from the definition of "nonlicensed." Read together, these provisions establish that an individual employed pursuant to a valid emergency authorization is an authorized teacher within the Board's accreditation framework.

OPI's contrary interpretation effectively collapses the Board's expressly recognized distinction between licensed teachers, authorized teachers, and nonlicensed personnel. The agency cannot acknowledge the existence of an emergency authorization while simultaneously disregarding its legal significance under the Board's own accreditation rules.

The Coalition therefore maintains that a properly emergency-authorized individual must be recognized as an authorized teacher for purposes of administering the Board's accreditation standards. OPI's imposition of an automatic Rubric A deficiency solely because such an individual does not possess a conventional teaching license fails to give effect to that recognized status and constitutes the disputed substantive departure from longstanding accreditation practice.

OPI's Accreditation Status Criteria Reference Guide uses the phrase "one or more unlicensed staff" for a deficiency rating. That guide's terminology cannot erase the exception contained in ARM 10.55.602(30), particularly where the Board's own operative personnel rule uses the defined term "nonlicensed." This discrepancy reinforces the Coalition's objection that OPI has converted administrative scoring language into a substantive accreditation rule without action by the Board.

OPI cites ARM 10.55.605(7)(a), which refers to employing a teacher without a Montana teaching license. The Coalition does not ignore that text. It maintains that the provision must be construed with the specific EAE authorization and the Board's express regulatory exception, not isolated to create a new categorical deficiency for a practice previously treated as compliant. OPI's proposed comparison to a misassigned licensed teacher is a policy judgment, not a Board-adopted amendment.

V. De Facto Rulemaking and MAPA

MCA § 2-4-102 defines generally applicable agency standards implementing or interpreting law or policy as rules, including amendments or repeals. MCA §§ 2-4-302 and 2-4-305 govern rulemaking procedure and validity. In Southern Montana Telephone Co. v. Montana Public Service Commission, 2017 MT 123, ¶¶ 15–21, 387 Mont. 415, 395 P.3d 473, the Montana Supreme Court invalidated a new generally applicable administrative rubric adopted without

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MAPA compliance. The Court looked to the rubric's actual substantive operation, not the agency's label for it.

That decision does not hold that every change in agency interpretation requires rulemaking. Here, however, the Coalition challenges a newly applied, generally applicable accreditation consequence that materially changes how lawful emergency-authorized employment is scored despite longstanding contrary practice and an express Board-adopted exception. If OPI's new scoring rule operates as a substantive standard, it is not insulated from MAPA merely because OPI calls it interpretation.

The constitutional defect is even more fundamental: even an otherwise procedurally proper OPI rulemaking could not displace the Board's authority to adopt accreditation standards. The defect is both the absence of the requisite rulemaking and the absence of authority in OPI to make this substantive accreditation policy change.

VI. Historical Administration and Arbitrary Reversal

The emergency authorization statute dates to 1971; the emergency authorization administrative framework dates to 1975; and the Board's accreditation framework dates to 1989. The EAE exclusion from “nonlicensed” appears in historical accreditation rules and survived the Board's recent Chapter 55 review. Districts report that properly authorized EAE placements were historically not assigned the same Rubric A deficiency OPI now imposes. The Coalition regards that established practice as a central fact, and the Board should examine its own historical scoring guides and accreditation records in evaluating the present departure.

The Board should not permit an OPI staff interpretation to silently reverse the operative effect of an exception the Board itself adopted and retained. Districts have expended substantial effort demonstrating unsuccessful recruitment, obtaining approvals, and staffing classrooms in compliance with state law. Treating that compliance as equivalent to employing an unauthorized individual undermines both the emergency authorization mechanism and the integrity of accreditation administration.

VII. Requested Board Action

The Coalition requests that the Board (1) affirm that it alone adopts substantive accreditation standards and establishes accreditation status; (2) direct that OPI cease using the disputed categorical EAE deficiency treatment pending Board action; (3) review and correct accreditation recommendations or determinations adversely affected solely by this newly asserted interpretation; (4) confirm that the express EAE exception in ARM 10.55.602 must be given operative effect; and (5) place this matter on its next available agenda for formal action. These requests seek enforcement of existing law, not an invitation to OPI to devise a post hoc justification for its departure.

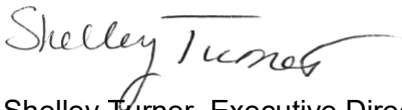
VIII. Conclusion

The Board's constitutional authority is not a formality that OPI may bypass through internal guidance. The Legislature created emergency authorization; the Board adopted the applicable accreditation rules; and OPI is charged with administration and recommendations, not substantive revision. The Coalition urges the Board to reject OPI's unilateral change, protect its constitutional and statutory responsibilities, and restore the proper treatment of lawfully emergency-authorized educators.

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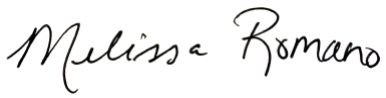
Coalition of Advocates for Montana's Public Schools Signatories

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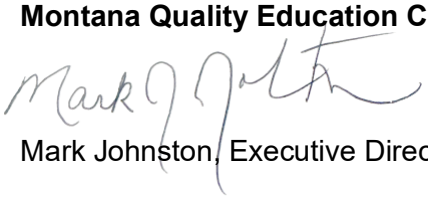
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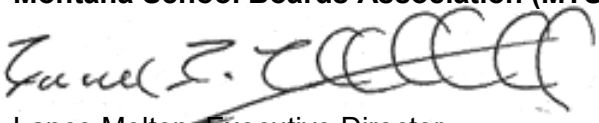
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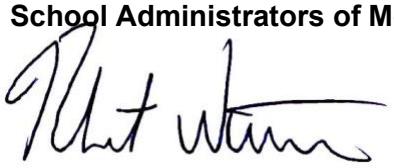
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Authorities and Source Documents

ARM 10.55.716(1)(b), (2), (3), (4) (operative uses of "nonlicensed" and distinction between licensed and authorized teachers); OPI Accreditation Status Criteria Reference Guide, School Leadership, Assignment and Licensure of Staff (Rubric E).
Mont. Const. art. X, § 9(3); art. III, § 1.
MCA §§ 20-2-114, 20-2-121, 20-4-101, 20-4-111, 20-7-101, 20-7-102; 2-4-102, 2-4-302, 2-4-305.
ARM 10.55.602(30), (51); ARM 10.55.605(7)(a); ARM 10.57.107.

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Southern Montana Telephone Co. v. Montana Public Service Commission, 2017 MT 123, 387 Mont. 415, 395 P.3d 473.
MCA 20-7-102 (2025): https://mca.legmt.gov/bills/mca/title_0200/chapter_0070/part_0010/section_0020/0200-0070-0010-0020.html

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