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68th Montana Legislature

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TO: Education Interim Committee Members
FROM: Laura Sankey Keip, Staff Attorney
DATE: June 14, 2023
RE: Overview of EDIC's Administrative Rule Review Authority

One of the primary functions of each interim committee, including the Education Interim Committee (EDIC), is to review the administrative rulemaking activities of the agencies it oversees. Specifically, [5-5-224, MCA](#), assigns rule review authority to EDIC over the following agencies and the entities attached to these agencies for administrative purposes:

- the State Board of Education, including the agencies allocated to the State Board pursuant to [2-15-1511, MCA](#):
 - the Montana Historical Society
 - the Montana Arts Council
 - the State Library Commission
- the Board of Public Education
- the Board of Regents of Higher Education
- the Office of Public Instruction.

To assist the committee in carrying out this rule review function, I will provide you with regular updates on rulemaking activities that happen throughout the interim. I will also inform you about specific issues that arise during the rulemaking process, opportunities for public comment and participation, and any other information requested by EDIC members. The remainder of this memo contains the following:

- I. An overview of the administrative rulemaking process
- II. A summary of EDIC's administrative rule review authority
- III. Changes enacted during the 2023 legislative session

I. Overview of Administrative Rulemaking

State agencies may be authorized to carry out the Legislature's intent by adopting administrative rules, which have the full force and effect of law. The Legislature authorizes an agency to adopt rules for many reasons – often, the agency, with its expertise and resources, is best suited to consider technical and procedural details. Further, while the Legislature adopts, amends, and repeals laws when it meets every two years, agencies may adopt and amend administrative rules on an ongoing basis as circumstances change or new issues arise.

Administrative rule functions are governed by the Montana Administrative Procedure Act, or MAPA, as well as relevant case law. The provisions of MAPA are codified in [Title 2, chapter 4, MCA](#). As defined in [2-4-](#)

[102\(11\), MCA](#), an administrative rule is an “agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency.”

Agency rules are found in the Administrative Rules of Montana (ARM). The Montana Administrative Register (MAR) is published by the Secretary of State twice a month, and the MAR contains the notices of proposed, amended, transferred, adopted, and repealed rules. The MAR also contains notices of public hearings, Attorney General opinions, and vacancies on state boards. The ARM and the MAR are available electronically at <http://www.mtrules.org/>.

As noted above, MAPA and case law provide the procedural framework and requirements for administrative rulemaking in Montana. However, MAPA’s provisions may be overridden by specific procedures or requirements set forth in another statute applicable to a specific agency. Importantly, MAPA itself does not provide any authority for an agency to adopt rules. Instead, that authority must be delegated to an agency by the Legislature in a statute specifically granting rulemaking authority.

Under [2-4-305\(3\), MCA](#), an agency may not propose or adopt a substantive rule unless “a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules” or “the rule implements and relates to a subject matter or agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends.” An administrative rule may be invalidated if it exceeds the scope of the enabling statute, if it is inconsistent with statutory requirements, or if it adds requirements not contemplated by the Legislature.

MAPA outlines several requirements for the rulemaking process, including the following:

- A notice of the proposed rulemaking action must be published in the MAR and must be sent to the appropriate administrative rule review committee (ARRC) at the same time. The notice must include a statement of reasonable necessity for the proposed action and provide information on how a member of the public can provide comments on the proposal. If the agency moves forward with the rule action, it must publish an adoption notice as well. ([2-4-302, MCA](#))
- An agency must provide "special notice" to the ARRC members and staff when an agency adopts an emergency rule. ([2-4-303, MCA](#))
- There are several timing requirements for the process: an agency must provide at least 30 days’ notice before taking action on proposed rulemaking but may not take more than 6 months to adopt the action in the proposal notice; the agency must provide at least 20 days’ notice if it will hold a hearing on the proposed action; and the agency must give members of the public at least 28 days to provide their comments and feedback on the proposed action. ([2-4-302, MCA](#))
- Additionally, an agency may not adopt a rule between October 1 and December 31 in the year preceding a regular legislative session, with two exceptions:
 - a rule may be adopted if it is an emergency rule; or
 - a rule implementing a program or policy may be adopted in this time period if the unavailability of information, guidance, or notice precluded the rule being adopted before October 1. ([2-4-305, MCA](#))

- see the end of this memo for an additional exception that was adopted by the legislature through [HB 739 \(2023\)](#).
- If the rules implement new legislation, the agency must contact the primary sponsor of the legislation when the agency begins working on the substantive content and wording of the proposal notice. This allows the sponsor to provide comments, informs the sponsor of the deadlines for completing each step in the rulemaking process, and informs the sponsor of the period for public comment. ([2-4-302, MCA](#))
- An agency must fully consider all oral and written comments regarding proposed rulemaking. ([2-4-305, MCA](#))
- Each rulemaking action must include a citation to the specific grant of rulemaking authority and the statute that the rule purports to implement. Further, the action itself must be “reasonably necessary to effectuate the purpose of the statute.” ([2-4-305\(3\) and \(6\)\(b\), MCA](#))
- During a regular session, the legislature may use a joint resolution to repeal a rule or an amendment that was adopted after the final adjournment of the last legislative session. If the agency adopts a replacement, the new rule must be in accordance with the objections stated in the joint resolution. Once the regular session adjourns, any rule that was adopted between the adjourned session and the prior session remains valid and cannot be repealed by joint resolution. Alternatively, the legislature may repeal, adopt, or amend a rule by bill. ([2-4-412, MCA](#))

II. Summary of EDIC's Rule Review Authority

Pursuant to 5-5-224, MCA, EDIC has administrative rule review authority over the agencies listed at the beginning of this memo, and any entities attached to these agencies for administrative purposes. However, pursuant to [2-4-102\(2\)\(a\)\(iii\)](#), the Board of Regents and the Montana University System are explicitly excluded from the provisions of MAPA.

Further, a 1992 district court decision held that the Board of Public Education has been vested with constitutional rulemaking authority which is both self-executing and independent of any powers delegated by the Legislature to the Board. However, since 2003, the Board has requested EDIC (and its predecessor, the Education and Local Government interim committee) to review its rules and has voluntarily complied with MAPA's process. See Mont. Bd. of Pub. Educ. v. Mont. Admin. Code Comm., No. BDV-91-1072, 1992 Mont. Dist. LEXIS 204 (1st Jud. Dist., Mar. 1992); see also footnote 2 in the committee's draft work plan for more information. Additionally, [20-7-101, MCA](#) specifically requires the Board to submit any new or revised accreditation standards to this committee for review.

The committee's administrative rule review authority is set out in [Title 2, chapter 4, parts 3 and 4, MCA](#). Under these provisions, as a committee, EDIC may:

- Request an agency submit their rulemaking records to review agency compliance with MAPA's provisions. ([2-4-402\(2\)\(a\), MCA](#))
- Prepare written recommendations for the adoption, amendment, or rejection of a rule, submit those recommendations to the department proposing the action, and submit oral or written

testimony at a rulemaking hearing. ([2-4-402\(2\)\(b\), MCA](#))

- Require that a rulemaking hearing be held according to 2-4-302 through 2-4-305, MCA ([2-4-402\(2\)\(c\), MCA](#))
- Institute, intervene in, or otherwise participate in proceedings involving MAPA in state and federal courts and administrative agencies ([2-4-402\(2\)\(d\), MCA](#))
 - If a majority of each house finds the rule to be contrary to the legislative intent, the rule must be conclusively presumed to be contrary to the intent of the legislature in any court proceeding involving the validity of the rule ([2-4-404, MCA](#))
- Commence a poll of all the members of the legislature to determine whether a proposed rule is consistent with the intent of the legislature ([2-4-403, MCA](#))
- Require the agency to prepare an economic impact statement relating to the adoption of the rule, upon the request of a majority of the appropriate ARRC or 15 individual legislators ([2-4-405, MCA](#))
- Object to a notice of proposed rulemaking and upon written notice, require a delay in the adoption of a rule ([2-4-305\(9\)](#) and [2-4-306\(4\)\(c\), MCA](#))
 - If the committee ties on a vote to object to an administrative rule, the president of the senate and the speaker of the house are ex officio voting members for the sole purpose of breaking the tie vote. ([2-4-112, MCA](#))
- Object to all or some portion of a proposed or adopted rule if the committee believes it was not proposed or adopted in substantial compliance with MAPA ([2-4-406, MCA](#))
- A committee's failure to object to a rulemaking action is inadmissible in court to prove the validity of that rule ([2-4-412, MCA](#))
- Recommend changes to MAPA or the adoption, amendment, or repeal of a rule ([2-4-411, MCA](#))
- An agency must report to its ARRC about any judicial proceedings in which the construction or interpretation of a provision of MAPA is at issue; the agency may report to the committee when a judicial proceeding concerns the construction or interpretation of an agency rule ([2-4-410, MCA](#))

III. Changes to rulemaking adopted during the 2023 Legislative Session

The 2023 Legislature passed [House Bill 739](#), which provided an additional exemption to the prohibition on adopting new rules between October 1 and December 31 immediately preceding a regular legislative session. Beginning October 1, 2023 (the effective date of HB 739), an agency may adopt a proposed rule if it provides the proposal notice and an explanation for why the rule must be adopted before the end of the year to each member and staffer for the ARRC and gives the committee a 10-day window to object to the proposed rule. If a majority of the committee objects to the proposal, the presiding officer will notify the agency and the rule may not be adopted before the end of the year.