



Education and Local Government Interim Committee

63rd Montana Legislature

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TO: Education and Local Government Interim Committee
FROM: Laura Sankey, Staff Attorney
RE: Overview of Administrative Rule Review Authority
DATE: June 24, 2013

Administrative rule review is a primary function of the Education and Local Government Interim Committee (ELG). Section 5-5-224, MCA assigns ELG the responsibility to review administrative rules promulgated by the following agencies and the entities attached to these agencies for administrative purposes: a) the State Board of Education; b) the Board of Public Education; c) the Board of Regents of Higher Education; and d) the Office of Public Instruction.

To assist ELG in carrying out this administrative rule review function, legal staff will provide regular updates to the committee on agency rulemaking activities throughout the interim. Legal staff will also inform ELG members about specific issues associated with rulemaking if and when an issue arises. The remainder of this memorandum contains the following:

- I. An overview of administrative rulemaking.
- II. A summary of ELG's administrative rule review authority.

I. Overview of Administrative Rulemaking

Administrative agencies are often authorized to carry out the Legislature's intent by adopting administrative rules, which have the full force and effect of law. There are many reasons why the Legislature authorizes an agency to adopt administrative rules; commonly, the administrative agency, with its expertise and resources, is best suited to consider technical and procedural details. Further, while statutes are only enacted every two years in Montana, administrative rules may be adopted and revised throughout the year as circumstances change or new issues arise.

Administrative rule functions are governed by the Montana Administrative Procedure Act (MAPA), Title 2, chapter 4, MCA, and relevant case law. Under § 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 published in the Administrative Rules of Montana (ARM). Additionally, the Montana Administrative Register (MAR) is published twice a month and contains notices of proposed, amended, transferred, repealed, and adopted rules. The MAR also contains notices of public hearings, Attorney General's opinions, and vacancies on state boards. The ARM and the MAR are available electronically at <http://www.mtrules.org/>.

As noted above, MAPA and related case law provide the procedural framework and requirements for administrative rulemaking in Montana; however, the provisions of MAPA may be supplanted by specific procedures or requirements set forth in statute that are applicable to the agency. However, MAPA does not itself provide an agency with the authority to adopt rules. Instead, that authority is delegated from the Legislature to the agency. According to § 2-4-305(3), 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 that is clearly and specifically included in a statute to which the grant of rulemaking authority extends." An agency's 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, including the following:

- R Notice of the proposed rule must be published in the MAR, which is published by the Secretary of State. The notice must comply with specific timelines. (2-4-302, MCA).
- R If the rulemaking is initially implementing 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. The purpose of notifying the primary sponsor is to obtain the legislator's comments, inform the legislator of the date by which each step of the rulemaking process must be completed, and provide the legislator with information about the time periods during which the legislator may comment on proposed rules. (2-4-302, MCA).
- R An agency must consider all oral and written submissions respecting a proposed rule. (2-4-305, MCA).
- R A rule must include a citation to the specific grant of rulemaking authority and must be "reasonably necessary to effectuate the purpose of the statute." (2-4-305, MCA).

II. Summary of ELG Administrative Rule Review Authority

Pursuant to § 5-5-224, the ELG has administrative rule review authority over rules from the State Board of Education, the Board of Public Education, the Board of Regents, and the Office of Public Instruction. Administrative rule review authority by the Legislature is

described in Title 2, chapter 4, parts 3 and 4, MCA. Under these provisions, ELG may:

- R Request an agency's rulemaking records to review compliance with MAPA. (2-4-402(2)(a), MCA).
- R Prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule, and submit oral or written testimony at a rulemaking hearing. (2-4-402(2)(b), MCA).
- R Require that a rulemaking hearing be held in accordance with the provisions of §§ 2-4-302 through 2-4-305, MCA (2-4-402(2)(c), MCA).
- R Institute, intervene in, or otherwise participate in proceedings involving MAPA in state and federal courts and administrative agencies. (2-4-402(2)(d), MCA).
- R Review the incidence and conduct of administrative proceedings under MAPA. (2-4-402(2)(e), MCA).
- R Request an agency's rulemaking records to review compliance with MAPA (2-4-402(2)(a), MCA).
- R Commence a poll of all the members of the Legislature regarding an objection to a rule. (2-4-403, MCA).
- R Require an economic impact statement relating to the adoption of a rule. (2-4-405, MCA).
- R Object to a notice of proposed rulemaking and require up a delay of up to 6 months in adoption of a rule. (2-4-305(9) and 2-4-306(4), MCA).
- R Object to all or some portion of a proposed or adopted rule the committee considers not to have been proposed or adopted in conformance with MAPA. (2-4-406, MCA).
- R Recommend a rule change or adoption. (2-4-411, MCA).
- R A committee's failure to object to the adoption, amendment, or repeal of a rule is inadmissible in court to prove the validity of that rule. Additionally, the agency must report to the committee about any judicial proceedings in which the construction or interpretation of MAPA is at issue. The agency may report to the committee any judicial proceedings in which the construction or interpretation of an agency rule is at issue. (2-4-410, MCA).