

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF PUBLIC HEARING ON
ARM 10.16.3122, 10.16.3346,)	PROPOSED AMENDMENT AND
10.16.3505, 10.16.3508, 10.16.3509)	REPEAL
through 10.16.3513, 10.16.3518,)	
10.16.3520, 10.16.3523, 10.16.3560,)	
10.16.3660 through 10.16.3662; and)	
repeal of 10.16.3514, 10.16.3515,)	
10.16.3517 and 10.16.3571)	
pertaining to special education)	

TO: All Concerned Persons

1. On November 6, 2015, at 10:00 a.m., the Superintendent of Public Instruction will hold a public hearing in the Superintendent's conference room, 1227 11th Avenue, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The Superintendent of Public Instruction will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Office of Public Instruction no later than 5:00 p.m. on October 21, 2015, to advise us of the nature of the accommodation that you need. Please contact Beverly Marlow, Office of Public Instruction, P.O. Box 202501, Helena, Montana, 59620-2501; telephone (406) 444-3172; fax (406) 444-2893; or e-mail bemarlow@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

10.16.3122 LOCAL EDUCATIONAL AGENCY RESPONSIBILITY FOR STUDENTS WITH DISABILITIES (1) remains the same.

(2) For the purposes of this rule, "resides" means ~~where the child lives during the school week~~ a student's residence as defined in 1-1-215, MCA.

(3) through (5) remain the same.

(6) The local educational agency must conduct routine checking of hearing ~~aides~~ aids in accordance with the requirements of 34 CFR 300.113.

(7) and (8) remain the same.

AUTH: 20-7-402, MCA

IMP: 20-7-403, 20-7-414, MCA

10.16.3346 AVERSIVE TREATMENT PROCEDURES (1) through (8) remain the same.

(9) Parents must be informed as soon as possible, but no ~~less~~ more than 24

hours after the procedure is used, in writing, or orally if in writing is not possible, in their native language each time an aversive procedure is implemented on their child.

AUTH: 20-7-402, MCA

IMP: 20-7-403, 20-7-414, MCA

10.16.3505 PARENTAL CONSENT (1) The local educational agency (LEA) shall ~~implement parental consent procedures as described in~~ obtain written consent for initial evaluation and initial provision of special education and related services prior to implementation of a student's individualized education program (IEP) consistent with 34 CFR 300.300 and consistent with this rule.

~~(2) Written parental consent for initial and annual placement of a student with disabilities in special education and related services shall be obtained by the local educational or public agency prior to the placement.~~

~~(a) The local educational agency shall maintain written documentation of the date of parental consent for initial or annual placement. Within one year of implementing the initial IEP, and annually thereafter, the IEP team shall timely meet to create an annual IEP. If the parent agrees with the proposed special education and related services and signs the IEP giving consent, the LEA shall begin implementation.~~

~~(b) If the parents and local educational agency cannot agree on the IEP but can agree on certain IEP services or interim placement, the student's new IEP would be implemented in the areas of agreement and the student's last agreed-upon IEP would remain in effect in the areas of disagreement until the disagreement is resolved.~~

~~(c) When parental consent for annual placement has not been obtained and has not been specifically refused, the local educational agency shall informally attempt to obtain consent from the parent.~~

~~(i) If parental consent cannot be obtained within a reasonable time, the local educational agency shall send written notice to the parent requesting approval and stating that the student with disabilities shall be provided special education and related services according to the student's individualized education program (IEP) as developed by the local educational agency 15 days from the date of the notice.~~

(3) The following procedures are intended to encourage continued parental participation in the development of the IEP, and to ensure the timely provision of FAPE when the parent does not agree and sign the annual IEP.

(a) Pursuant to 34 CFR 300.503, the LEA shall provide prior written notice of the changes to the parents, which includes a copy of the IEP, invites the parents to submit written exceptions to the IEP, and indicates that, if the parent does not respond, the LEA may implement the IEP as developed by the IEP team beginning 15 days following the date of the prior written notice.

(b) If the parent does not identify, in writing, the disputed special education and related services in the proposed IEP within 15 days of the date of the prior written notice, the LEA may implement the proposed IEP.

(c) If a parent provides written exceptions to the proposed special education and related services in the annual IEP within 15 days of the prior written notice the LEA shall implement the IEP in the areas of agreement. The student's last agreed-

upon IEP shall remain in effect in the areas specifically disputed in writing, as exceptions, until the disagreement is resolved or implemented as provided below.

(i) The LEA shall allow a reasonable amount of time to resolve the disagreements before sending the second prior written notice. If agreement is reached and the parents sign the IEP giving consent, the LEA shall begin implementation.

(ii) If agreement is not reached after a reasonable amount of time, the LEA shall provide a second prior written notice that includes the IEP which resulted from the discussion with the parents and shall implement the annual IEP 15 days after the date of the second prior written notice.

~~(ii) (4) If no response from the parent is obtained, the local educational agency shall~~ the LEA provides the student any special education and related services according to the student's annual IEP without parental consent subject to the parent's right to ~~pursuant to the requirements above, a parent may request an impartial due process hearing under ARM 10.16.3507 through 10.16.3523 or utilize other available dispute resolution procedures.~~

AUTH: 20-7-402, MCA

IMP: 20-7-403, 20-7-414, MCA

10.16.3508 INITIATING SPECIAL EDUCATION DUE PROCESS HEARING

(1) A parent or public agency as defined in 34 CFR 300.33 may request for an impartial due process hearing involving the education or possible identification of a student with disabilities. The request shall be made in writing to the Superintendent of Public Instruction, P.O. Box 202501, Helena, MT 59620-2501. A copy of the request shall be mailed to the other party.

(2) remains the same.

~~(3) Upon receipt, the Superintendent of Public Instruction shall mail a copy to the other party.~~

(4) remains the same but is renumbered (3).

(4) Pursuant to 34 CFR 300.508 (e) and (f), the party receiving a due process complaint has ten days to file a response, and if required, the LEA must send prior written notice.

(5) All pleadings and discovery shall be filed and served both electronically and by U.S. mail. The time period for any response shall begin on the next business day following electronic service.

AUTH: 20-7-402, MCA

IMP: 20-7-402, MCA

10.16.3509 SPECIAL EDUCATION DUE PROCESS HEARING PROCEDURES APPOINTMENT OF IMPARTIAL HEARING OFFICER

(1) Upon receipt by mail of a signed written request for a due process hearing involving a special education controversy, the Superintendent of Public Instruction shall:

(a) promptly advise the LEA district administration and parent, legal guardian, or surrogate parent of the request for due process hearing; and

(b) and (b)(i) remain the same.

(ii) ~~Selection of impartial hearing officer:~~

~~(A) Upon receiving a request for hearing, the Superintendent of Public Instruction shall mail to each party a list of the names of five proposed impartial hearing officers together with a summary of their qualifications. appoint an impartial hearing officer from the maintained list of qualified, available, impartial hearing officers.~~

~~(B) Each party shall have five business days following receipt of the list of names to study the list, cross off any two names objected to, number the remaining names in order of preference, and return the list to the Superintendent of Public Instruction. Requests for more information about proposed impartial hearing officers must be directed to the Superintendent of Public Instruction. Unless good cause is shown, this request for more information does not extend the five business day response time. (This five business days is counted as part of the 45-day period allowed for the issuance of the final order in a due process hearing. See ARM 10.16.3523.)~~

~~(C) If the parties arrive at a mutually agreeable choice, the Superintendent of Public Instruction shall make the appointment from the ranking.~~

~~(D) If, despite efforts to arrive at a mutually agreeable choice, the parties cannot agree upon an impartial hearing officer, the Superintendent of Public Instruction shall make the appointment from the names ranked by the parties.~~

(2) An impartial hearing officer may at any point withdraw from consideration appointment or from service in any hearing in which the impartial hearing officer believes a personal or professional bias or interest on any of the issues to be decided in the hearing exists which might conflict with the impartial hearing officer's objectivity. Such written request to withdraw shall be directed to the Superintendent of Public Instruction. Any subsequent appointment of an impartial hearing officer shall be conducted as provided above.

AUTH: 20-7-402, MCA

IMP: 20-7-402, MCA

10.16.3510 SCHEDULING CONFERENCE AND NOTICE OF HEARING

(1) The impartial hearing officer shall, within five business days of the filing of the response or the completion of the resolution process, whichever comes first, conduct a prehearing scheduling conference pursuant to ARM 10.16.3512. The impartial hearing officer shall inform the parties of all future proceedings in this matter. Following the prehearing scheduling conference, the impartial hearing officer shall issue a notice of hearing. The notice of hearing shall include, at a minimum:

- (a) a statement of the date, time, place, location, and nature of the hearing;
- (b) a schedule for discovery, including schedule for identification of expert and lay witnesses and exchange of proposed exhibits, prehearing motions and post-hearing legal briefs and/or proposed findings of fact, conclusions of law and order;
- (c) references to the specific applicable statutes and rules ~~involved available~~ at that time;
- (d) remains the same.
- (e) a provision informing the parent of any free or low-cost legal and other

relevant services available in the area; and

~~(f) a statement of issues and matters to be discussed at the hearing. a statement of whether or not the parent wants an electronic verbatim record of the hearing and/or the findings of facts and decision; and~~

~~(g) consideration of such other matters as may aid in the disposition of the action.~~

(2) The notice of hearing shall be sent by certified mail to any party not represented by counsel. Any party represented by counsel shall be served by regular and electronic mail addressed to the attorney representing the party.

~~(3) If the impartial hearing officer does not have details of the issues and matters to be discussed at the time of issuing the notice of hearing, a party or impartial hearing officer may later demand a more detailed account of the issues and matters to be discussed.~~

~~(a)~~ The notice of hearing as well as all communications conducted in the hearing shall be written in language understandable to the general public and in the native language of the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication is not written language, the impartial hearing officer shall direct the notice to be translated orally or by other means to the parent in his/her native language or other means of communication.

(4) The dates scheduled by the impartial hearing officer in the notice of hearing may be continued by at the hearing officer's discretion as stipulated after stipulation by the all parties or upon motion of a party showing reasonable necessity for the continuance, but in no event beyond 12 months from the date of filing of the due process action. In determining whether to grant a request for continuance, ~~or~~ approve a stipulation for continuance, or approve any action which may unduly delay the hearing, the hearing officer shall consider the potential negative impact on the student who is the subject of the hearing, including the impact to the student's right to FAPE due to a delay of the hearing process.

(5) The impartial hearing officer shall conduct the hearing at a time and place reasonably convenient to the parent and student. If the parties cannot agree on such time and place, the hearing will be held in the county in which the named LEA is located.

AUTH: 20-7-402, MCA

IMP: 20-7-402, MCA

10.16.3511 CONFERENCE AND INFORMAL DISPOSITION (1) The impartial hearing officer may informally confer with the parties to the request for impartial due process hearing for the purpose of attempting informal disposition of any special education controversy in addition to the requirements in ARM 10.16.3510 and 10.16.3512.

(2) This conference of informal disposition may occur at any time prior to the issuing of the final findings of fact, conclusions of law and order of the impartial hearing officer. The parties may ~~informally confer to~~ resolve the special education controversy by stipulation, agreed settlement, dismissal, or other resolution ~~consent order, or default.~~ To be effective, any agreement made at such conference must be reduced to writing and signed by all parties. An agreed resolution shall end the

proceedings upon formal action of the hearing officer ~~unless a party to the hearing appeals the decision under ARM 10.16.3523.~~

AUTH: 20-7-402, MCA

IMP: 20-7-402, MCA

10.16.3512 IMPARTIAL HEARING OFFICER'S PREHEARING CONFERENCE - FORMULATING ISSUES (1) The impartial hearing officer shall ~~schedule~~ conduct a prehearing conference prior to the hearing to:

- (a) identify and clarify the issues to be decided at the hearing;
- (b) and (c) remain the same.
- ~~(d) set discovery and prehearing schedule, including schedule for identification of expert witnesses;~~
- ~~(e) determine if the parent wants an audio record of the hearing and/or the findings of facts and decision; and~~
- (f) remains the same but is renumbered (d).

(2) Any evidence to be introduced at the hearing, including all evaluations and recommendations based on the evaluations, shall be disclosed to the opposing party at least five business days before the hearing.

(3) Initial objections to the introduction of any offered evidence must be made at least three business days prior to the hearing.

~~(2) (4) The impartial hearing officer shall make an order which recites the action taken at the conference, any amendment to the request for impartial due process hearing, the agreements made by the parties as to any of the matters considered, and which limits the issues for the hearing to those not disposed of by admissions or agreements of the parties. Such order when entered will control the subsequent course of action, unless modified at the hearing to prevent manifest injustice. The impartial hearing officer, in his/her discretion, may establish by rule a prehearing calendar on which actions may be placed for consideration as provided above.~~

(3) remains the same but is renumbered (5).

~~(4) The impartial hearing officer shall conduct the hearing at a time and place reasonably convenient to the parent and student. If the parties cannot agree on such time and place, the hearing will be held in the county in which the named school district is located.~~

AUTH: 20-7-402, MCA

IMP: 20-7-402, MCA

10.16.3513 DISCOVERY (1) The impartial hearing officer may compel, or limit or conduct discovery prior to the hearing and/or prehearing conference pursuant to ARM 10.16.3514 through 10.16.3516.

(2) Within the discretion of the hearing officer, the following methods of discovery are available to the parties upon the filing of a request for due process:

- (a) depositions;
- (b) written interrogatories;
- (c) requests for admissions;

(d) production of documents or things; and
(e) permission to enter upon land or property, to observe educational programs and other purposes.

(3) The time for responding to requests for production, requests for admission, and interrogatories is 20 calendar days from the date the discovery requests are served on the receiving party or such other time as set by the hearing officer.

(4) The hearing officer shall set a date by which discovery must be completed and establish a calendar so that discovery does not delay the hearing.

(5) The hearing officer may limit or compel discovery as necessary to balance the need for reasonable discovery with the need to not unduly delay the hearing.

AUTH: 20-7-402, MCA

IMP: 20-7-402, MCA

10.16.3518 AVAILABILITY OF CROSS-EXAMINATION OR PARTICIPATION IN THE HEARING (1) ~~The right to examine, or cross-examine or to participate as a party in this action shall be limited to the attorneys, the parties named in the matter, and the impartial hearing officer. The A lay advocates with special knowledge or training with respect to students with disabilities who may accompany and advise a particular party named in the matter, the particular parties named in the matter, and the impartial hearing officer.~~

(2) Parents involved in hearings have the right to have the child who is the subject of the hearing present at the hearing and open the hearing to the public.

AUTH: 20-7-402, MCA

IMP: 20-7-402, MCA

10.16.3520 POWERS OF THE IMPARTIAL HEARING OFFICER (1) The impartial hearing officer may:

(a) and (b) remain the same.

(c) provide upon request of a party, as deemed necessary by the hearing officer, allow for the taking of testimony by depositions of witnesses who will not be available for the hearing, including video or audio testimony of a witness who is unavailable or when procurement of the witness in person at the hearing will be unduly costly and burdensome for a party, without causing unreasonable delay of the proceedings;

(d) set the time, ~~and place,~~ and length of the hearing and direct parties to appear and confer to consider simplifications of the issues by consent of the parties involved;

(e) fix the time for filing of briefs or other documents; and

(f) remains the same.

(2) The impartial hearing officer shall be bound by common law and the Montana Rules of Evidence, except as provided by these rules. Evidence, including hearsay evidence, is admissible if the impartial hearing officer deems it to be

reasonable, appropriate, and reliable. All evidence and objections to evidence shall be noted in the record.

(3) Documents or other evidence regarding the student who is the subject of the proceeding or his or her parents contained in the LEA or public agency's educational records as defined in the Federal Educational Rights and Privacy Act (FERPA), and its implementing regulations at 34 CFR 99, shall be allowed as self-authenticating, and shall require no extrinsic evidence of authenticity as a condition precedent to admissibility.

(a) ~~(4)~~ aAny part of the evidence may be received in written form.

(b) ~~d~~Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original. Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the impartial hearing officer's specialized knowledge.

AUTH: 20-7-402, MCA

IMP: 20-7-402, MCA

10.16.3523 FINAL ORDER ON SPECIAL EDUCATION DUE PROCESS HEARING DECISIONS (1) The impartial due process hearing officer shall render, in writing, findings of fact and conclusions of law separately stated and an order concerning all matters at issue in the hearing within ~~45 days of the Superintendent of Public Instruction's receipt of the request for hearing~~ the 45-day time frame delineated in 34 CFR 300.515, unless an extension of time has been granted by the impartial hearing officer. The impartial hearing officer may grant a request by either party for a specific extension of the 45-day period allowed for rendering a final order. The hearing officer shall mail, or personally deliver, a written copy of the findings of fact, conclusions of law and order to each of the parties and to the Superintendent of Public Instruction. The hearing officer shall also mail or deliver the record as defined in ARM 10.16.3522 to the Superintendent of Public Instruction.

(2) In the event the impartial hearing officer has granted a written request from a party to extend the 45-day period in which to render a final decision, the impartial hearing officer shall notify the Superintendent of Public Instruction, in writing, when the decision ~~is due~~ will be issued, providing justification for the extension and including consideration of the impact on the student at issue in the matter. In the event the decision is not rendered within 90 days from the date the request for impartial due process hearing was filed with the Superintendent of Public Instruction, the Superintendent of Public Instruction may remove the impartial hearing officer and appoint another impartial hearing officer.

(3) The impartial hearing officer may order reimbursement for parents for the unilateral placement of their child if the LEA's ~~school-district's~~ placement is determined to be inappropriate and the parent's placement is deemed appropriate.

(4) and (5) remain the same.

(6) The Superintendent of Public Instruction shall ~~only~~ be responsible for paying only administrative costs related to the hearing, including necessary expenses incurred by the impartial hearing officer and ~~stenographic~~ court reporter

services. The parties involved shall each be responsible for any legal or other fees that occur.

~~(7) Every party to a controversy shall comply with these rules of procedure. Failure of one party to do what is required and which substantially prejudices the proceedings may necessitate a request by the impartial hearing officer of a court order for compliance. A court of competent jurisdiction may award reasonable attorneys' fees to a prevailing party in accordance with 34 CFR 300.517.~~

~~(8) In the event that parents of a student with disabilities prevail, a court of competent jurisdiction, in its discretion, may award reasonable attorney's fees as part of the costs to the parents. The awarding of attorney's fees is subject to the limitations found under 34 CFR 300.517.~~

(9) remains the same but is renumbered (8).

AUTH: 20-7-402, MCA

IMP: 20-7-402, MCA

10.16.3560 SPECIAL EDUCATION RECORDS (1) remains the same.

(2) The OPI shall enforce this rule consistent with the IDEA. LEAs found to be out of compliance by OPI with provisions of this policy under IDEA shall be given an opportunity to come into compliance; demonstrate policies, procedures, or practices to ensure future compliance; be required to complete a corrective action plan consistent with this rule and applicable state and federal law; or any other sanctions determined necessary and appropriate by the OPI.

~~(2)~~ (3) The special education record retained by each LEA shall include access log, request for initial evaluation, permission for evaluation, summaries of assessments, test protocols, and other information that are not subject to sole possession requirements of FERPA, evaluation reports, individualized education programs, and reports of the student's progress toward meeting annual goals of the individualized education program.

AUTH: 20-7-402, MCA

IMP: 20-7-403, 20-7-414, MCA

10.16.3660 EARLY ASSISTANCE PROGRAM (1) remains the same.

(2) A parent, guardian, adult student, LEA school district, or their representative may request early assistance in any issue related to a student's free appropriate public education violation of Part B of the IDEA, 20 U.S.C. 1400, et seq., or Montana special education laws, Title 20, chapter 7, MCA, and corresponding regulations at 34 CFR Part 300 and ARM 10.16.3007, et seq. The Early Assistance Program does not require formal, written application; however, request for early assistance may be made in writing to the Superintendent of Public Instruction, Legal Division-Dispute Resolution Office, P.O. Box 202501, Helena, MT 59620-2501. There is no pre-established procedure that must be followed.

~~(3) The Early Assistance Program focuses on substance -- the quick resolution of problems of mutual concern to all parties. It is not based on the model of an impartial third party resolving a legal dispute between parties with conflicting goals or interests. It is, however, based on the goal of ensuring the delivery of a free~~

~~appropriate public education. The Early Assistance Program draws on the traditional model of parents and schools working cooperatively to achieve their shared goal of meeting the educational needs of the student with disabilities.~~

~~(4) As stated in Pursuant to ARM 10.16.3662, immediately following the filing of a formal administrative state complaint as referenced in 34 CFR 300.151 through 300.153 (as distinguished from a request for due process), a parent or guardian and the local educational or public agency may to allow the Superintendent of Public Instruction, through the Early Assistance Program, has 15 business days from the day it receives the written complaint to attempt to resolve the problem through the Early Assistance program. Pursuant to 34 CFR 300.152(b)(1)(ii) these 15 business days shall not be counted as part of the 60-day complaint resolution timeline.~~

~~(5) (4) The services offered under this program are available in all circumstances where there is a possibility for resolution. If the Early Assistance Program manager director decides that any attempt to mutually resolve the complaint would be futile, the compliance officer dispute resolution office shall proceed according to the procedures and timelines set forth in 34 CFR 300.151 through 300.153 and ARM 10.16.3662.~~

AUTH: 20-7-402, MCA

IMP: 20-7-403, MCA

10.16.3661 OPPORTUNITY TO PRESENT STATE COMPLAINTS (1) ~~The Superintendent of Public Instruction has established state complaint procedures to comply with Pursuant to 34 CFR 300.151 through 300.153.~~ Individuals or organizations alleging that a Montana local educational or public agency has violated the provisions of Part B of the IDEA, 20 U.S.C. 1400, et seq. or Montana special education laws including failure failed to provide a student with disabilities a free appropriate public education or procedural safeguards may use ARM 10.16.3662 to file a state complaint. As used in this chapter, the term "local educational agency (LEA)," shall include other public agencies or state-operated programs.

AUTH: 20-7-402, MCA

IMP: 20-7-403, 20-7-414, MCA

10.16.3662 STATE COMPLAINT PROCEDURES (1) An organization or individual may file a written signed complaint ~~that alleging the local educational or public agency is violating~~ LEA violated the Individuals with Disabilities Education Act (20 U.S.C., sections 1401 through 1485) or its implementing regulations (34 CFR, part 300), the Montana statutes pertaining to special education (Title 20, chapter 7, part 4, MCA) or the administrative rules promulgated by the Superintendent of Public Instruction governing special education (ARM Title 10, chapter 16).

(2) The state complaint must:

(a) allege a violation that occurred not more than one year prior to the date that the complaint is received filed;

(b) state the name and address of the affected child, if applicable, and the name of the school where the violation allegedly occurred;

~~(c) contain a specific statement of what requirement of a federal or state statute, regulation, or rule that applies to a student with disabilities or special education the local educational or public agency has allegedly violated that the agency has violated a requirement of federal or state special education laws or regulations; and~~

~~(c) (d) include a statement of state the nature of the problem and the facts on which the each allegation is based; and~~

~~(e) state a proposed resolution of the problem to the extent known and available to the complainant.~~

(3) The complaint must be filed the complaint with the Compliance OPI Dispute Resolution Officer, Office of Public Instruction, P.O. Box 202501, Helena, Montana 59620-2501 and forward a copy provided by the complainant to the local educational or public agency serving the child LEA, or other party if the complaint is filed by the LEA. The compliance dispute resolution officer may return the complaint for a more complete statement of the issue. The compliance officer may and contact the complainant orally or in writing to discuss the details of the complaint before acceptance and filing of the complaint.

(4) Within ten calendar days of receipt of the final written complaint filing, the compliance dispute resolution officer shall send written notification notice to the complainant and the local educational or public agency LEA that a complaint has been filed.

(a) The ~~compliance officer~~ written notice shall include a copy of the complaint with the notice to the local educational or public agency.

(b) If the complaint addresses matters listed in 34 CFR 300.503(a)(1) and (2) relating to the identification, evaluation, or educational placement of a student with a disability, or the provision of a free appropriate public education to the student, the ~~compliance officer~~ written notice shall inform the complainant of the right to request a due process hearing under 34 CFR 300.507 and ARM ~~10.16.3507~~ 10.16.3508 through ~~10.16.3523~~ 10.16.3531.

(c) The written notice shall inform the ~~local educational or public agency and the complainant that parties~~ the compliance officer will contact both parties to notify them of the availability of the Early Assistance Program as set forth in ARM 10.16.3660.

(5) ~~If the local educational or public agency and the complainant are successful in resolving the dispute within 15 business days, the complaint will be dismissed. If the dispute is not resolved through the Early Assistance Program process, the compliance officer shall immediately request the local educational or public agency to prepare and submit its written response to the complaint within ten calendar days of receiving the notice that the Early Assistance Program has been unsuccessful. An extension may be granted to the local educational or public agency by the compliance officer based on reasonable necessity. The local educational or public agency shall send its response to the compliance officer and a copy to the complainant. The EAP shall have up to 15 business days from the filing of the complaint to assist the parties to resolve the dispute. If successful, the complaint will be dismissed. If the EAP process is not successful, the dispute resolution office shall immediately notify the responding party to prepare and submit its written response of the complaint to the dispute resolution office and send a copy~~

to the complainant within ten calendar days. An extension may be granted based on reasonable necessity.

(6) Upon receipt of the ~~local educational or public agency's~~ response, the ~~compliance dispute resolution~~ officer shall begin an appropriate investigation.

(7) The complainant will have ten calendar days to submit additional relevant information to the ~~compliance dispute resolution~~ officer ~~additional information~~, either orally or in writing, ~~about the allegations in the complaint and the local educational or public agency's written response to the complaint.~~

(8) ~~During the investigation neither the complainant nor the local educational or public agency or others representing either party shall contact the compliance officer without notifying the other party.~~ Following an appropriate investigation, the ~~compliance dispute resolution~~ officer shall review all relevant information and make an independent determination as to whether ~~the local educational or public agency is violating a violation of a requirement of federal or state statute, regulation, or rule concerning IDEA special education has occurred~~ the provision of a free appropriate public education to a student with disabilities. ~~The compliance officer shall write a A final report shall be issued~~ within 60 days of receipt ~~filing~~ of the complaint unless an extension of the 60-day period is required by exceptional circumstances which exist with respect to the particular complaint or the timeline was modified during the Early Assistance Program process.

(9) The final report ~~will~~ shall address each allegation in the complaint and ~~state list~~ findings of fact and legal conclusions ~~of law, if required.~~ ~~The written decision will contain~~ including the reasons for the ~~compliance officer's~~ decision. If the ~~compliance officer final report~~ concludes that an allegation is true and that corrective action is required to comply with federal or state law, ~~the compliance officer will order the corrective action and shall be ordered include~~ including timelines for implementation of such action. The Superintendent of Public Instruction will provide technical assistance at the request of the local educational or public agency. The Office of Public Instruction shall retain the investigative files as a confidential agency record pursuant to the appropriate retention schedule ~~complaint, investigative records, and the final report shall be filed in a confidential file retained by the compliance officer.~~

(10) At any time during this process, if the ~~compliance dispute resolution~~ officer determines ~~that~~ the complaint has been resolved and compliance is achieved, ~~the compliance officer shall inform the complainant and the local educational or public agency of that fact in writing~~ parties shall be informed and the complaint shall be dismissed.

(11) If within ~~60 days~~ one year of issuance of the final report, the ~~local educational or public agency~~ LEA has not implemented the corrective action required by the final report, the Superintendent of Public Instruction shall take appropriate sanctions against the local educational or public agency. Such sanctions may include:

(a) recommending to the Board of Public Education withholding state education funds;

(b) denial in whole or part IDEA, Part B federal funds; or

(c) recommending to the Board of Public Education a change in accreditation status.

(12) If Prior to implementing the final report order, and prior to implementing sanctions against the LEA, and if the local educational or public agency LEA alleges that the compliance officer has violated a state or federal special education statute, regulation, or rule in ordering the corrective action required by the final report, the Superintendent of Public Instruction shall provide the local educational or public agency with a hearing in accordance with 34 CFR 76.401, and the Montana Administrative Procedure Act, 2-4-601 through 2-4-711, MCA, prior to implementing sanctions.

(13) There is no right to appeal a final report issued as a result of a state complaint.

AUTH: 20-7-402, MCA

IMP: 20-7-403, 20-7-414, MCA

4. The board proposes to repeal the following rules:

10.16.3514 DISCOVERY METHODS, AUTH: 20-7-402, MCA; IMP: 20-7-402, MCA

10.16.3515 SCOPE AND LIMITATION OF DISCOVERY, AUTH: 20-7-402, MCA; IMP: 20-7-402, MCA

10.16.3517 SEQUENCE AND TIMING OF DISCOVERY, AUTH: 20-7-402, MCA; IMP: 20-7-402, MCA

10.16.3571 PARENTAL CONSENT FOR RECORDS, AUTH: 20-7-402, MCA; IMP: 20-7-403, 20-7-414, MCA

5. REASON: The OPI has determined that it is reasonably necessary to amend these rules pertaining to special education to clarify and correct policy and practice consistent with the IDEA. Specifically, proposed amendments include language in ARM 10.16.3122 to ensure consistency between law and rule regarding legal residency. Legal residency would take precedence over the inconsistent rule, thereby creating confusion for application of the rule. There is an error corrected in ARM 10.16.3346. Amendments to ARM 10.16.3505 provide detailed procedure for continuation of education services to be provided to a student eligible for special education when there is disagreement over an annual renewal of an IEP. Presently, the student at issue is left with an outdated IEP which must be implemented by the LEA if the parents do not consent to a new IEP, which is contrary to the intent of the IDEA. Proposed language in ARM 10.16.3508 clarifies that the party requesting a due process claim is responsible for sending the request to the opposing party. Amendments to ARM 10.16.3509 are necessary to allow for the required appointment of an impartial hearing officer by the OPI for due process hearings without a strike list. There are not many trained impartial hearing officers in this state. When a request for a due process hearing is made, the OPI is responsible for finding a trained impartial hearing officer and must have more flexibility to utilize the individuals trained and available to conduct a hearing.

Proposed language in ARM 10.16.3510 through 10.16.3523, and the repeal of ARM 10.16.3514, 10.16.3515, and 10.16.3517 are also reasonable and necessary to implement the intent of the IDEA by the use of due process hearings which are designed by IDEA to efficiently and quickly resolve disputes. Current rules, including extensive discovery, have created a hearing process which more resembles a full trial than an expeditious means to continue the special education of an eligible student. The educational needs of the student are not being met by prolonged hearings. The amendments to ARM 10.16.3560 and repeal of ARM 10.16.3571 better reflect the intent and requirements of IDEA regarding protection of confidential student records. Revisions to ARM 10.16.3660 through 10.16.3662 correct and clarify the processes for the Early Assistance Program and for a state complaint in accordance with applicable federal laws.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Beverly Marlow, Office of Public Instruction, P.O. Box 202501, Helena Montana, 59620-2501; telephone (406) 444-3172; fax (406) 444-2893; or e-mail beanmarlow@mt.gov, and must be received no later than 5:00 p.m., November 12, 2015.

7. Ann Gilkey, Chief Legal Counsel for the Superintendent of Public Instruction, has been designated to preside over and conduct this hearing.

8. The Office of Public Instruction maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above or may be made by completing a request form at any rules hearing held by the agency.

9. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

10. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and repeal of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Ann Gilkey
Ann Gilkey
Rule Reviewer

/s/ Denise Juneau
Denise Juneau
Superintendent of Public Instruction

Certified to the Secretary of State October 5, 2015.