

Montana Board of Public Education Executive Summary

Date: March 9-10, 2023

Presentation	Legal Review of Chapter 55 Process
Presenter	Rob Stutz
Position Title	Chief Legal Counsel Office of Public Instruction
Overview	The purpose of this is to review the MAPA process for public comment during the rule revision process and examine how the Board did not follow the MAPA process. We are strongly recommending that the Board rescind the comments their subcommittee made during the public comment process.
Requested Decision(s)	Information Only
Related Issue(s)	Accreditation Standards; MAPA; Public Comment; Revision Process
Recommendation(s)	n/a



Montana
Office of Public Instruction
Elsie Arntzen, State Superintendent
opi.mt.gov



Board of Public Education Members,

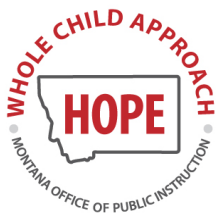
In review of the actions the Board has taken during the Chapter 55 Accreditation Standards revision process, it has come to my attention that the Board did not follow the Montana Administrative Procedure Act (MAPA) process.

The Board-approved Accreditation Sub-committee submitted their own comments on the proposed rule changes during the publicly noted comment period, thus failing to allow the public to comment on the sub-committee's internal recommendations. I believe that this undermined the public's rights to weigh in on and participate in the rulemaking process under the Montana Constitution (Mont. Const. Art. II, §§8, 9) and MAPA (§2-4-302(1)(a)).

To the extent the Board might adopt final rules that are substantially different from the proposed rules, and those substantive differences are the result of the sub-committee's recommendations, not comments from the public, I am concerned that the public's rights may have been undermined.

I am requesting that your adoption of the rule changes be done with the removal of the sub-committee's comments and the Board's acceptance of any sub-committee comments that significantly impacted the rules.

Elsie Arntzen
State Superintendent of Public Instruction



ACCREDITATION STANDARDS – CHAPTER 55 – BOARD OF PUBLIC EDUCATION

OPI ANALYSIS OF BPE RESPONSES TO COMMENTS

CONCERNS AND REMEDIES – February 23, 2023

BACKGROUND

The Board of Public Education (BPE) published a [rulemaking notice](#) on October 7, 2022, proposing changes to the state accreditation standards (“Chapter 55”). BPE’s proposed rules were based on the recommendation of the Superintendent of Public Instruction, developed through a [negotiated rulemaking process](#) that included a diverse negotiated rulemaking committee (NRC).

The final rules must be adopted within six months of the proposed rules, i.e. by April 7, 2023. In order for the proposed rules to be adopted by that deadline, BPE must file the rulemaking notice with the Secretary of State’s office by [March 14, 2023](#). Extending the adoption period for the rules is not an option because the newly amended accreditation rules must be in place by July 1 to be implemented for the upcoming 2023-24 school year.

BPE’s [next meeting](#) is scheduled for March 9-10. It is the only remaining meeting during which the rulemaking adoption notice can timely be finalized by BPE.

BPE received comments from the public on the proposed rule at a hearing on October 31, 2022. BPE also received written public comment through November 4, 2022, when the public comment period ended.

At some point prior to BPE’s meeting in November 2022 – and critical to this analysis – BPE received, considered, and acted upon written recommendations from its Accreditation Committee.

CONCERN

A public agency must give public notice of its proposed rulemaking actions. [§ 2-4-302\(1\)\(a\), MCA](#). The rulemaking process is established in [part 3](#) of the Montana Administrative Procedure Act (MAPA).

Montana citizens have a constitutional right to know about and participate in the operation of public agencies. [Mont. Const. Art. II, §§ 8, 9](#). In large part, Montanans had the opportunity to know about and participate in BPE’s rulemaking process.

However, to the extent that BPE might adopt final rules that are substantively different from the proposed rules, and those substantive differences are the result of the committee’s recommendations, not comments from the public, **OPI is concerned that the public’s rights under the Montana Constitution and MAPA may have been undermined**. The comments from the public during the rulemaking comment period could not have included comments on the committee’s internal recommendations because those recommendations did not exist during the comment period and were not included in the notice of proposed rulemaking.

The concern, and the risk resulting from the concern, can be remedied by BPE adopting final rules based only on comments from the public, not from the recommendations from BPE’s committee.

BPE ACTION ON CHAPTER 55 RULEMAKING	#
Approved NRC Recommendation	26
Approved NRC Recommendation with Minor Adjustments	10
Approved NRC Recommendation with Significant Adjustments	1
Disapproved NRC Recommendation	12
No Change Recommended by NRC	14
Total Number of Rules Under Consideration	63
NRC Recommended Rules Not Reviewed by the BPE During Meetings Due to No Public Comment Received	10

SUMMATION

Number of Current Individual Rules in Chapter 55 is 58.

Number of New Rules Recommended in Chapter 55 was 5.

Total Number of Rules Under Consideration was 63.

Total Number of Rules with No Recommended Changes was 14.

Total Number of Rules that the NRC Considered was 49 (63-14).

Total Number of Rules that the NRC Established Consensus was 48 (98%).

Unresolved Rule that the NRC did not receive consensus was 1 (2%).

Total Number of Rules that the BPE Approved either fully or with adjustments was 37 of the 49 (76%).

Total Number of Rules that the BPE Disapproved was 12 of the 49 (24%).

Total Number of Rules that the BPE received public comment was 39.

Number of Rules the BPE committee provided public comment was 12 of the 39.

BPE's committee made recommendations on the following proposed rules and amendments:

- **New Rule IV – Evaluation** The committee partially agreed with their own comments recommending retaining parts of current language.
- **10.55.601 – Accreditation Standards: Procedures** The committee comment referenced inconsistencies when referring to integrated action plan recommended use of integrated action plan
- **10.55.602 – Definitions** Two comments: (a) The committee recommended reviewing definitions not in rule and later tabled definitions until January where the BPE voted to remove any definitions not in Chapter 55 and have the OPI provide clear guidance to define commonly used terms. (b) The BPE also commented on graduate profile or profile of a graduate inconsistencies recommending consistency.
- **10.55.605 – Accreditation** Two comments: (a) The committee comment referenced inconsistencies in “accredited with probation” and “accredited on probation”. Recommended consistency. (b) This section needs more work. There are major concerns from the committee on numerous areas.
- **10.55.704 - Administrative Personnel: Assignment of District Superintendents** The committee recommended removing (1) (a-c) because it is already in statute.
- **10.55.705 – Administrative Personnel: Assignment of School Administrators/Principals** The committee stated this section needs more work as they were unclear between 1 and 2.
- **10.55.709 – Library Media Services K-12** The committee stated this section needs more work and require action by local trustees to provide library services personnel. *Note: it was an exact duplication of 10.55.710. The BPE's action agreed with their comment without objection.*
- **10.55.710 – Assignment of School Counseling Staff** The committee stated this section needs more work and require action by local trustees to provide library services personnel. *Note: it was an exact duplication of 10.55.709. The BPE's action was to withdraw their comment.*
- **10.55.712 – Class Size Elementary** The committee stated that the human resources language is unclear as to what would qualify. The BPE voted to agree with their comment, and it passed on a 4-3 vote.
- **10.55.803 – Learner Access** The committee stated that the language is not consistent with the stem and recommended changes. The BPE approved the committee's language.
- **10.55.907 – Distance, Online, and Technology – Delivered Learning** Two comments (a) The committee noted this section needed clean-up, which BPE approved. (b) The committee suggested changes to when digital providers need to be approved by the OPI.
- **10.55.908 – School Facilities** - The committee noted a school district does not have discretion in meeting state and federal accessibility requirements. The BPE agreed.
- **General Comments** The committee recommended retaining specific grade level language when referring to grade band and suggested grade level or grade band. The BPE approved.

BPE's committee made a total of 16 comments. ***The one general comment and the approval of the committee's recommendation had the most significant impact because it affected ten different rules.***

On two of the rules, the committee was the only commenter: 10.55.803 (Learner Access) and the general comments on grade band.

Of the 12 rules the BPE's committee provided comments, MFPE also provided comments on eleven of those rules, and the other education associations commented on eight of those rules. BPE agreed with MFPE and/or the other Education Associations on eleven of the rules, or **92% of the time**.

In contrast, the BPE agreed with the negotiated rule making committee's recommendations **76 percent of the time**. The BPE agreed with associations more often than with the diverse representation of stakeholders from the negotiated rule-making committee. The NRC received over 3,000 public comments on the draft rules during the negotiation process.

During the January 13, 2023, review of public comments, the BPE engaged in negotiations with the MUS representative related to FAFSA completion requirements (started in graduation requirements – which the BPE refused but then went to New Rule II, where they had already previously responded to public comment and approved, to add language the MUS system wanted.) New Rule II – Family and Community Engagement was not formally opened by the BPE. Changes were recommended and approved.

https://youtube.com/clip/UgkxyudFeXXkcZ5J_QIPoLZ48cOew9TH7XE

Comment 77 was voted on by BPE. It was a 4-3 vote to simply add background checks. This rule provided substantial flexibility to the schools. At the end of the meeting, a board member who voted yes, indicated they may have voted wrong. BPE determined to reopen the rule. The new vote substantially changed the outcome on ARM 10.55.712. The BPE was advised by its executive director the bylaws did not prohibit a vote even though the legislature is bound to votes and cannot re-votes that substantially change the outcome. **This change in ARM 10.55.712 has a significant impact on Montana schools and the flexibility that was sought to address class size support differently.**

<https://youtube.com/clip/Ugkxvca1m5ex4zmOOqLDFh9UIuCSQO2YALuT>

The BPE processes reflected inconsistency and raises questions regarding the committee using a process outside of MAPA.

10.55.1001 Program Standards – Most Significant

Changing grade band to Grade level or grade band would be a significant change that was not based on public comment.

https://youtube.com/clip/UqkxW-imsNik4_kJdzqpeyZwiROKVWlvVldP

The rationale, we are just not ready for grade bands yet.

This single word change **affected 10 different rules**.

10.55.712 – Class Size Elementary - Significant

Inserting language from current rules, removed the flexibility districts were seeking in being able to provide effective support to classrooms in overload situations. Class size evidence is very limited and there is no conclusive evidence that class size impacts student learning.

Why 10.55.1001 is the Most Significant Change

Montana has for over a decade encouraged the proficiency of students. For over 50 years our State Constitution has established a goal of personalized learning – meeting the full education potential of each person. These two key elements in measuring student learning requires us to move away from grade level standards.

Most of our methods of measurement reflect student status related to grade-level standards, so if we always simply teach to grade-level standards, how do we find out where students really are in their learning progressions? Many districts have moved to standards-based grading as their measure of proficiency, yet without finding out where students really are in their learning progressions, how does our system of learning help them?

We must be asking questions that include:

- How will the school architecture of measurement support students who do not have the foundational knowledge for age-based curriculum?
- For districts moving to proficiency measures, how will the district know what skills students have and how will you track their progress?
- Everyone has some holes in their learning, but when students do not have prerequisite skills or have significant gaps in their learning, it creates tremendous pressure on the students and teachers. Are there instructional strategies or ways of organizing curriculum that can better serve students with gaps instead of grade-level standards?
- When do we need to personalize learning for the student?
- What does it really mean for Montana if students are showing growth in their learning, but don't meet grade-level standards?
- Why do we continue to teach students grade-level standards based on their age when their skills range from two, three, or more academic levels lower or higher?

Because of the flaws that are in the current systems of our schools, the recommendation was to move the progression of learning to grade bands from age-driven standards.

When Montana adopted the common core (now called Montana content standards), the focus shifted to the grade level standards instead of the entire learning progress. Grade bands shift the focus to entire learning progressions. It is a movement away from "covering the standards" to learning the skills necessary to demonstrate learning. Proficiency is highly unlikely in a model of **covering** grade-level standards.

The OPI's work, under the direction of the State Superintendent, took the Case for Change supported by the legislature, School Boards, OPI, Governor's office, Office of the Commissioner of Higher Education, and BPE. To get the results Montana students, deserve, the design of the system has to change to meet student needs differently. Continuing to double-down on the grade-level standards is not getting the results Montana needs and are vital to our student success beyond the walls of K-12.

10.55.712 – Class Size Elementary - Significant

Comment 77 – The committee noted the language is unclear and recommended their own language which was later modified to include the old language of 1.5 hours/day with student overload to have support.

Why Class Size Elementary is a Significant Change

The old accreditation language reflected that a certain class size was the key to student learning and if class size exceeds the standards, then an instructional aide shall be assigned a minimum of 1.5 hours per day, per student overload up to six hours.

When we look at the research on class size, of which there are few credible studies and many look at the 1980s Tennessee Star study, that it matters if it is significant (reduction of 7-10 students per class), other studies have been mixed and in Florida and California studies show no effect.

When school finances are limited, the cost-benefit test of any policy must pass the question: “does this policy have any positive effect on student learning?” The popularity of class-size reduction makes it tough to increase class size or look at different alternatives for providing support.

The recommendation from the Negotiated rule-making committee included school leaders who understand human resource impact in the classroom. Rather than simply set another ratio standard without evidence of its effect.

State resources for education should **always be carefully allocated, with cost-benefit analysis.**

CONSIDERATIONS

- **Did the BPE’s use of a committee to make comments follow the MAPA process?**
- **Did the public have the opportunity to know about and participate in the committee’s recommendations and offer public comment?**
- **Did the BPE follow proper protocols when:**
 - **New Rule II was amended without opening the rule for additional amendment?**
 - **It allowed a rule amendment to be reconsidered, which significantly changed the earlier vote and outcome of the rule.**

REMEDY

The BPE, in recognizing that they **did not follow the MAPA process, must take action at its March 9-10 meeting to remove the committee’s comments.** This would eliminate the impact of the committee’s recommendations that the BPE approved.

Eleven of the twelve rules that the committee addressed in its recommendations already had public comment that the BPE accepted.

The removal of the committee’s recommendations would eliminate the significant impact, based on the committee’s recommendation, to include “grade level or grade band.” That action impacted ten other rules.