October 29, 2015

TALKING POINTS ON OPI PROPOSED CHANGES TO SPECIAL EDCUATION RULES AS PUBLISHED IN MAR NOTICE NUMBER 10-16-124 (Oct. 15, 2015)

1. **Proposed amended Rule 10.16.3505. OPI should maintain the right of a parent to refuse consent to special education and related services as described in a proposed IEP and continue to require school districts (LEA's) to implement only those provisions of a proposed IEP which are agreed upon and the provisions of the last agreed upon IEP as to any contested provisions.**

    a. **This has been the rule in Montana for almost 25 years.**
        i. Since the initial Montana regulations implementing the 1991 amendments to IDEA, Montana regulations have required school districts to obtain parental consent for initial and annual placement under an IEP (i.e. the special education and related services that will be provided to the child under an IEP). *See* 9 Mont. Admin. Register 791—792 (May 13, 1993); 15 Mont. Admin. Register 1923–24 (Aug. 12, 1993).
        ii. The official comments to these regulations indicate the parental consent requirement was enacted to ensure full parental participation in development of an IEP and that portions of the IEP to which parents have given consent are fully implemented pending resolution of disputes regarding other portions of the IEP.

    b. **Parental consent is required to preserve the strong protections for educational equity and a parent's privacy interest in decisions regarding their child's education guaranteed by Montana's constitution.**
        i. Though IDEA itself does not require parental consent to an IEP, federal law does not contain the explicit educational and privacy rights guaranteed by Montana's 1972 Constitution.
        ii. Specifically, Montana's Constitution guarantees "[e]quality of educational opportunity . . . to each person of the state." Mont. Const. Art. X, § 1.
        iii. Further, unlike the Federal constitution, Montana's Constitution explicitly guarantees a right of individual privacy. *Id.* at Art. II, § 10. Though the federal constitution provides broad protection of parent's educational decision making, the explicit privacy protections of the Montana constitution are even greater. *See e.g. State v. Ellis*, 2009 MT 192, ¶ 22, 351 Mont. 95, 210 P.3d 144; *compare with Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (holding that parents have an implicit individual liberty interest under the U.S. Constitution to make educational choices about their children).

c. The proposed regulation creates only the illusion of parental participation, but actually allows a school to force a contested IEP upon a parent without any accountability.

i. Under the existing regulation, the burden is on the school district to obtain parental consent. If the parents and school district cannot agree, the IEP will be implemented in the areas of agreement. The district and parents both have the options of continuing to work towards a mutually agreeable solution or requesting resolution of the conflict by an administrative hearing officer in a due process hearing.

ii. Under the proposed amended regulations, the burden is shifted to the parents. The district is only required to provide prior written notice to the parents of the changes to the IEP, but then can implement the IEP—with or without the parent's consent—15 days after providing prior written notice.

iii. The parent has one opportunity to provide written objections to the proposed IEP, but even if the parent does provide written objections, the school district can still implement its preferred IEP, over the parent's objections, after allowing a "reasonable" time to reach an agreement. The regulation does not define the term "reasonable."

iv. If neither the parent nor the district seeks a due process hearing, the contested IEP, implemented over the parent's objection, can remain in place indefinitely.

v. OPI has already acknowledged it does not have enough qualified hearing officers. Implementing this rule will only create more due process hearings and further exacerbate the pressure on the limited number of hearing officers available to resolve these unnecessary disputes.

vi. Additionally, forcing cases to due process increases the likelihood that parents and school districts will each engage attorneys. This comes at significant costs to the parents, the school district and the taxpayers. It also significantly increases the likelihood that the relationship between the school district and the parents will be damaged by drawn-out litigation as will the ability of the school district and the parents to work together as collaborators towards the student's future educational needs. The student's access to an appropriate IEP may be delayed throughout the course of litigation, and the student loses out during a critical time in his development.

2. **Proposed amended Rule 10.16.3122(2). OPI should maintain the current rule which requires the school district where a child lives during the school week to serve that child. The proposed amended rule creates absurd results where a district on one side of the state could be required to serve a child on the other side of the state; the district where a child actually lives could refuse to serve the child; and a parent would have to file a lawsuit in district court in order to determine which district is required to service a child. The proposed rule is very likely to create situations where no district will accept responsibility for a student or where the district where the child lives during the school week demands reimbursement from another district.**

a. In 1993, OPI adopted a common sense residency regulation that places the responsibility for providing IDEA services on the school district where the child resides during the school week.

b. OPI proposes to change that regulation and instead have a child's residency for school purposes determined by Montana's general residency statute, Mont. Code Ann. § 1-1-215.

c. Mont. Code Ann. § 1-1-215 was initially enacted over 120 years ago and over 75 years before Montana adopted compulsory school attendance laws. *See* Mont. Code Ann. § 20-5-102. This statute is antiquated and generally defines the child's residence by where the parent or custodian lives, even when the child doesn't live with that parent or custodian. Section 1-1-215 is in need of updating itself and is not responsive to the reality of the many Montana children who do not live in two-parent households because of family difficulties, a parent's death, a parent in military service, placement in the legal custody of the Child and Family Services Division of the Montana Department of Public Health and Human Services (CFSD), or other out-of-home institutional settings, divorce, or parental separation.

d. For example, § 1-1-215, defines the residency of a child whose parents do not have legal custody as the residence of the court appointed legal guardian or custodian. CFSD, an agency of the State of Montana is "resident" in Helena, Montana at its official headquarters. Therefore, a child whose natural parents' parental rights have been suspended or terminated and who is placed in the legal custody of CFSD, would have to be served by the Helena School District, regardless of whether the child lived in a foster home in Ekalaka, over 500 miles away.

e. Mont. Code Ann. § 1-1-215 also provides that if a controversy arises regarding a child's residency, the controversy must be resolved by a district court. This is particularly problematic in the case of a child who is subject to a parenting plan where both parents share educational decision making authority. Montana parenting plans generally do not designate one parent or the other as the "legal custodian" and that term is rarely used in Montana parenting matters at all. As parenting responsibilities are shared equally, neither parent has sole "legal custody." Since the child has no single legal custodian , § 1-1-215, would not define where the child "resides" and a parent (or school district) would have to file a lawsuit in district court to determine where the child resides, and which district is required to provide services. With over 10,000 domestic relations cases filed or reopened in Montana each year, this creates a huge burden on parents, schools and the courts. *See Montana District Courts 2014 New Case Filings and Reopened Cases* (Mont. Sup. Ct., 2015) (available at http://courts.mt.gov/portals/113/dcourt/stats/2014stat.pdf).

f. Significantly, when a child is mandatorily placed in a school outside of his home district, the home district may be required to pay the receiving district for the cost of educating the child. *See* Mont. Code Ann. §§ 20-5-101(2); 20-5-320—324; Title 20, Ch. 10 (regarding costs for food and transportation). If the out-of-district placement is not mandatory, the receiving district can charge the parent for tuition and transportation. *Id.* at § 20-5-320. The proposed rule is very likely to lead to infighting between districts either refusing to enroll an out-of-district student or refusing to reimburse another district for the costs of tuition and transportation.

If you have questions regarding the possible impact of these rules, please feel free to contact Tal Goldin, DRM Education Unit supervising attorney at tal@disabilityrightsmt.org.