November 23, 2022

Superintendent Elsie Arntzen                 VIA EMAIL ONLY
J.P. Williams, State Director of Special Education
John Gorton, School Improvement Unit Manager
Office of Public Instruction (OPI)
1227 11th Avenue, 2nd Floor
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OPIMSAAWaiver@mt.gov

Re: Special Education Alternative Assessment Waiver

Dear Superintendent Arntzen, Mr. Williams, and Mr. Gorton,

I am writing to express our organization’s concern about the process by which OPI is seeking a waiver of the 1% cap on students assessed using alternate assessment aligned with alternate academic achievement standards (AA-AAAS) under 34 C.F.R. § 200.6(c)(4). Disability Rights Montana (DRM) is the federally mandated Protection and Advocacy System and Client Assistance Program for Montana. We are responsible for protecting and advocating for the human, legal, and civil rights of persons with disabilities, including children with disabilities in K-12 schools.\(^1\)

As you know, AA-AAAS are not aligned to general grade-level achievement standards. Instead, they are aligned to alternate academic achievement standards that only apply to children with the most significant cognitive disabilities. In practice, this means students receiving AA-AAAS and their parents do not receive the same benefit as those undergoing general grade-level assessments in that they do not receive information about how the student is performing in relation to most of their peers or general grade-level standards. Of course, achievement of grade-level standards are important indicators for success in—and often prerequisites for—further education, employment, and independent living.

In *Endrew F.* the Supreme Court directed that “every child should have the chance to meet challenging objectives.”\(^2\) “Holding high expectations for . . . students [with the most significant

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cognitive disabilities] is key to helping all students meet or exceed State challenging academic standards.”

By definition, students undergoing AA-AAAS are not assessed against or held to the same high standard as most other students. Thus, the decision to subject even more students to this differentiation should not be taken lightly and is a matter of important public concern. “The alternate academic achievement standards were designed to be appropriate only for a very small number of students, no more than 1.0 percent of all students assessed.”

To ensure the public is fully informed and has the opportunity to meaningfully participate in the decision-making process, OSEP delineated explicit, unequivocal public notice requirements in its September 20, 2022 memorandum:

For each new 1.0 percent cap waiver request, a State must provide the public and any interested LEA in the State with notice and a reasonable opportunity to comment and provide input on the entire waiver request (including the plan and timeline described above), in the manner in which the State customarily provides similar notice and opportunity to comment to the public. The State must submit the comments and input to the Department with a description of how the State addressed the comments and input.

OPI has failed to comply with this requirement. OPI has not provided the “entire waiver request (including the plan and timeline described [in the OSEP memo])” to the public for comment. OPI posted on its website a letter dated November 7, 2022 seeking public comment. On November 14, 2022, OPI contributed to an article about the proposed AA-AAAS published in the Helena Independent Record. Neither the request for public comment or the article contained the “entire waiver request (including the plan and timeline described [in the OSEP memo])” or a link to that information.

On November 22, 2022 our education advocate, Christa Gabriel, who is also our designated representative for DRM’s mandatory seat on the Special Education Advisory Panel (SEAP), explicitly asked for a copy of the waiver request and was told by OPI that the entire waiver request would not be made available until after the public comment period closed. We have also been made aware that on November 22, 2022 the Executive

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3 Memo from Patrick Rooney, Director, School Support and Accountability, Office of Elementary and Secondary Education and Valerie Williams, Director, Office of Special Education Programs Office of Special Education and Rehabilitative Services, Information Regarding the Requirements to Request a Waiver or Waiver Extension for the 2022-2023 School Year (SY) from the One Percent Cap on the Percentage of Students with the Most Significant Cognitive Disabilities Who May Be Assessed with an Alternate Assessment Aligned with Alternate Academic Achievement Standards (AA-AAAS) 1 (U.S. DOE Sep. 20, 2022), available at https://oese.ed.gov/files/2022/09/Memo-to-States-re-One-Percent-Waiver-Requirements-2022-2023.pdf (hereinafter “OSEP memo”).
4 Id.
5 Id. at 3 (emphasis in original).
Director of the Advocacy Institute, a partner organization to the Council of Parent Attorneys and Advocates, Inc. (COPAA), a large national advocacy group for students with disabilities, sought this information as a member of the public. Again, OPI refused to provide the entire waiver request until after it is submitted to the U.S. Department of Education (DOE) and the comment period closed.

It is impossible for the public or the SEAP to provide meaningful comment on OPI’s waiver request without actually reading the request in its entirety. Even if this was not explicitly required by the OSEP Memo (which it clearly is), it should have been provided as part of the basic elements of a public comment process.8

The OSEP Memo also requires that the “entire waiver request” must be provided “in the manner in which the State customarily provides similar notice and opportunity to comment to the public.”9 Montana Code Annotated § 2-4-302 details Montana’s customary public notice process. It does not appear that OPI followed this process. For example, the posting on OPI’s website does not indicate that any notification was filed with the Montana Secretary of State for publication in the Montana Administrative Register (MAR).10

To remedy these clear deficiencies in OPI’s compliance with the OSEP Memo, we are asking that OPI restart the public comment process, provide proper notice with the “entire waiver request” or a hyper link thereto, request comment as required by the OSEP Memo, and provide a new deadline of no less than 30 days from the date of publication in the MAR for the public to submit comment. As usual, the explanatory information should be “written in plain, easily understood language”11 and also be provided in accessible formats as needed.12

To ensure DRM can fully consider the proposed waiver, we are also requesting the following public records pursuant to Article II, Section 9 of the Montana Constitution and Montana Code Annotated § 2-6-1003, et seq. Please provide copies of the following documents and information regarding the proposed Special Education Alternative Assessment Waiver:13

1. Any and all recordings, minutes, and notes of any and all meetings on the proposed waiver;
2. Any and all sign in sheets for any such meetings;
3. Any and all requests for comment on the proposed waiver, including any attachments thereto and records of when, where, and how comment was sought;
4. All documents received by OPI in response to the request for comment on the proposed waiver;

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8 See e.g. Mont. Code Ann. § 2-4-302 (requirements for public notice under Montana Administrative Procedures Act); see also OSEP Memo at 3 (“entire waiver request” must be provided “in the manner in which the State customarily provides similar notice and opportunity to comment to the public”).
9 OSEP Memo at 3.
11 Id. at § 2-4-302(1)(a).
12 See 42 U.S.C. § 12132 (prohibition on disability discrimination in state activities) and 28 C.F.R. § 35.160 (Americans with Disabilities Act effective communication regulations).
13 https://content.govdelivery.com/bulletins/gd/MTOPI-3371951?wgt_ref=MTOP_WIDGET_55&fbclid=IwAR1MfEzfrT-qoV5KtCusqB0FGBDiXN9NCFNDLnJYulpGVtAMBoCiBO7CQX4
5. Any and all state-level data or other information OPI is relying upon in seeking the proposed waiver, including that information required by 34 C.F.R. § 200.6(c)(4);

6. Any and all plans, strategies, and the like documenting OPI’s current plans for providing the oversight required by 34 C.F.R. § 200.6(c)(3) and working with school districts to prevent the need to seek similar waivers in the future, including, without limitation the assurances required by 34 C.F.R. § 200.6(c)(4)(iii) and the plan required by 34 C.F.R. § 200.6(c)(4)(iv);

7. Any and all proposed waiver requests or similar documentation prepared for submission to the DOE, including all drafts of such documentation, notes on such drafts, interlineations, and similar revisions;

8. A copy of Montana’s currently applicable alternate academic achievement standards for students with the most significant cognitive disabilities;

9. A copy of all alternative assessments OPI proposes to use during the term of the proposed waiver, including any and all testing instructions and descriptions of psychometric and statistical properties of the assessments;

10. Copies of all currently effective Montana guidelines and other documentation OPI uses or proposes to use to meet the requirements of 34 C.F.R. § 200.6(d);

11. All communications regarding the proposed waiver including, without limitation, internal and external emails and memoranda.

Because we are requesting documents that we understand OPI is required to provide or maintain as part of its waiver request and/or should already be easily accessible to OPI, we are requesting a fee waiver for this public records request. For the same reason, we believe these records should be easy to retrieve and should not require significant review to produce. Therefore, and given the pending current comment deadline, we request that you reply no later than December 1, 2022. We are not seeking these documents for any commercial gain.

I am very happy to work with you to clarify or narrow this request if possible or necessary. I may be reached by email at bernie@disabilityrightsmont.org. You may also reach out to Tal Goldin, the Supervising Attorney for our Education, Employment and Benefits Unit, at tal@disabilityrightsmont.org. Please also copy Tal on correspondence related to this request.

Thank you for your anticipated cooperation in this matter.

Sincerely,

DISABILITY RIGHTS MONTANA

By: _______________________
    Bernadette Franks-Ongoy,
    Executive Director

cc: Denise Marshall (denise@copaa.org), CEO, COPAA
    Ayorkor Austin (Ayorkor.Austin@ed.gov), OSEP Montana Lead
    Clayton Hollingshead (clayton.hollingshead@ed.gov), DOE Montana Lead