VOLUME NO. 44 **OPINION NO. 4**

ADMINISTRATIVE LAW AND PROCEDURE - Statutory authority of Board of Public Education to promulgate rule on gifted and talented education, conflict with statute;
EDUCATION - Statutory authority of Board of Public Education to promulgate rule on gifted and talented education;

PUBLIC EDUCATION, BOARD OF - Statutory authority to promulgate rule on gifted and talented education;
SCHOOL BOARDS - Statutory authority of Board of Public Education to establish programs for gifted and talented students;
SCHOOL DISTRICTS - Statutory authority of Board of Public Education to establish programs for gifted and talented students;
ADMINISTRATIVE RULES OF MONTANA - Section 10.55.804;
MONTANA CODE ANNOTATED - Sections 2-4-406, 20-2-121, 20-7-101, 20-7-901 to 20-7-904;
MONTANA CONSTITUTION - Article X, section 9(3)(a);
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 104 (1988), 41 Op. Att'y Gen. No. 23 (1985), 39 Op. Att'y Gen. No. 11 (1981).

HELD: The Board of Public Education's rule requiring every school district to make an identifiable effort to provide educational services to gifted and talented pupils, promulgated pursuant to the Board's statutory authority to adopt accreditation standards, conflicts with the provisions of section 20-7-902(1), MCA.

January 15, 1991

Alan D. Nicholson
Board of Public Education
33 South Last Chance Gulch
Helena MT 59620-0601

Dear Mr. Nicholson:

You have requested my opinion on the following question:

> Does the Board of Public Education's rule requiring every school district to make an identifiable effort to provide educational services to gifted and talented pupils, promulgated pursuant to sections 20-2-121(11), 20-7-903, and 20-7-101, MCA, conflict with the provisions of section 20-7-902(1), MCA?

In 1979 the Montana Legislature enacted sections 20-7-901 to -904, MCA, providing for the education of gifted and talented students in the Montana public school system. Section 20-7-902(1), MCA, provides:

> A school district may identify gifted and talented children and devise programs to serve them.

Legislative history indicates that testimony at public hearings strongly supported adoption of the statutes and emphasized the need for special services for gifted and talented children. See Minutes of Senate Education

Committee, February 12, 1979. The legislative history does not, however, demonstrate that the statute was intended to place a mandatory duty upon school districts to implement a program for gifted and talented students, but rather to merely permit the creation of such programs and provide limited funding for them through the office of the Superintendent of Public Instruction. Section 20-7-902, MCA, has not been amended since it was enacted in 1979.

In 1983, sections 20-7-903 and 20-7-904, MCA, were amended to include the Board of Public Education (the Board) as one of two entities charged with adopting criteria for program proposals for gifted and talented children.

> The conduct of programs to serve gifted and talented children must comply with the policies recommended by the superintendent of public instruction and adopted by the board of public education.

§ 20-7-903(1), MCA. See also § 20-7-904, MCA (the policies of the board must assure that proposals submitted by school districts to the superintendent outlining services to gifted and talented students address and comply with certain statutory criteria).

Following public hearings in 1984 and 1988, the Board adopted and then readopted the rule in question, which states:

> 10.55.804 GIFTED AND TALENTED (1) Beginning 7/1/92 the school shall make an identifiable effort to provide educational services to gifted and talented students, which are commensurate with their needs and foster a positive self-image.
>
> (2) Such services shall be outlined in a comprehensive district plan which includes:
>
> (a) identification of talent areas and student selection criteria according to a written program philosophy;
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> (b) a curriculum which reflects student needs;
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> (c) teacher preparation;
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> (d) criteria for formative and summative evaluation;
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> (e) supportive services;
>
> (f) parent involvement.

In your opinion request you note (as did the Board's 1984 Notice of Public Hearing on the proposed rule) that the authority of the agency to adopt the rule was based on sections 20-2-121(7) and (11) and 20-7-101, and that the rule implements section 20-7-903, MCA.

Section 10.55.804, ARM, was originally adopted by the Board in 1984 and later revised, readopted, and published in the Administrative Rules of Montana in 1989. Appended to the rule published in the Administrative Rules of Montana in 1989, pursuant to section 2-4-406, MCA, was an objection by the Administrative Code Committee concluding that the rule was invalid. The Committee's objection was based on its conclusion that the rule "makes mandatory what the Montana Code Annotated makes discretionary." Administrative Code Committee objection to § 10.55.804, ARM. As noted above, the rule was intended to implement certain statutory provisions. Importantly, the Notice of Public Hearing did not assert that the Board intended to adopt the rule pursuant to any authority provided by the Montana Constitution. Your question by its terms and intentions is confined to an issue of statutory construction and avoids any mention of the constitutional authority of the Board set forth in the Montana Constitution, Art. X, § 9(3)(a). In fact, in presenting your question, you have specifically asked that I not address the constitutional authority of the Board. My answer to your question, in recognition of the limits of my discretion, focuses solely upon the construction of those statutes designated in your request and relied upon by the Board as authority for the adoption of the rule in question and does not directly or indirectly refer to, implicate, substantiate, or question the constitutional authority of the Board.

As mentioned, the Board relied upon sections 20-2-121(11), 20-7-903, and 20-7-101, MCA, as authority for the promulgation of the Board's mandatory rule on gifted and talented education. Your question is whether the Board's action in that context conflicts with the provisions of section 20-7-902(1), MCA. I am obliged to conclude, for the reasons discussed hereafter, that the rule in question, § 10.55.804, ARM, does impermissibly conflict with section 20-7-902(1), MCA.

Analysis of the issue must begin with a review of the pertinent statutes. Section 20-7-903(1), MCA, provides:

> The conduct of programs to serve gifted and talented children must comply with the policies recommended by the superintendent of public instruction and adopted by the board of public education.

That section is not a grant of authority to the Board, but simply states that *if* a school district operates a gifted and talented educational program, the conduct of the program "must comply with the policies recommended by the

superintendent of public instruction and adopted by the board of public education." § 20-7-903(1), MCA. Thus, it is clear that the Board of Public Education could not have promulgated section 10.55.804, ARM, pursuant to any authority granted by section 20-7-903(1), MCA.

The Board is provided statutory authority to adopt standards of accreditation pursuant to sections 20-7-101 and 20-2-121(7), MCA. Those sections provide:

> **20-7-101. Standards of accreditation.** (1) Standards of accreditation for all schools shall be adopted by the board of public education upon the recommendations of the superintendent of public instruction.
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> **20-2-121. Board of public education -- powers and duties.** The board of public education shall:
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> ....
>
> (7) adopt standards of accreditation and establish the accreditation status of every school in accordance with the provisions of 20-7-101 and 20-7-102[.]

With respect to the area of gifted and talented children, however, the Board is restricted to the adoption of *policies*. Section 20-2-121(11), MCA, provides:

> **20-2-121. Board of public education -- powers and duties.** The board of public education shall:
>
> ....
>
> (11) adopt policies for the conduct of programs for gifted and talented children in accordance with the provisions of 20-7-903 and 20-7-904[.]

Such policies are applicable only if, pursuant to section 20-7-902, MCA, a school district elects to identify gifted and talented children and devise programs to serve them.

The statutory reference in section 20-2-121(11), MCA, to sections 20-7-903 and 20-7-904, MCA, is noteworthy. Those two sections were adopted by the Montana Legislature in 1979, when lawmakers first addressed the issue of education for gifted and talented students. In referring to those two sections, it is obvious that the Legislature was aware of the local control provided for in section 20-7-902, MCA, which allows school districts, should they choose, to "identify gifted and talented children and devise programs to serve them." § 20-7-902, MCA.

When section 20-2-121(11), MCA, was considered by the Legislature a statement of intent was filed:

> A statement of intent is required for this bill because it delegates rulemaking authority to the Board of Public Education to adopt policies for programs serving gifted and talented children.
>
> It is contemplated that the rules will address the following:
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> a. a policy statement fostering development of programs serving the gifted and talented;
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> b. acknowledgment of the provisions in 20-7-904, MCA, regarding review of programs by the Superintendent of Public Instruction; and
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> c. an annual review of services to gifted and talented children by the Board of Public Education.

The policies adopted by the Board, according to the statement of intent, were meant to address the review of programs and services to gifted and talented students. The statement of intent therefore demonstrates, as does the language of the section itself, that with the passage of section 20-2-121(11), MCA, the Legislature did not intend to provide a statutory grant of authority to the Board to require the creation of gifted and talented programs.

This is also confirmed by the minutes of the meeting of the Education and Cultural Resources Committee of the Montana State Senate, dated March 11, 1983, which state:

> HOUSE BILL 196: Representative Peck, District 8, sponsor of the bill, said the bill enables the Board of Public Education to adopt policies regarding gifted and talented programs. He noted rules were originally going to be adopted governing gifted and talented programs but because of 1) the expense, and 2) the Board had adopted policies governing special education already, the bill was submitted in this form with an effective date of July 1, 1984.

Additionally Lee Heiman, committee counsel, summarized House Bill 196 in a memorandum to the Senate committee that stated:

> House Bill 196 (Peck). Provides that policy direction on programs for gifted and talented children originate with the Board of Public Education and be administered by the Superintendent of Public Instruction.

It is clear that in the original draft of House Bill 196, the delegation of legislative rulemaking authority was contemplated; however, the bill was amended to strike "rules" and insert "policies."

Because the rule adopted by the Board of Public Education, § 10.55.804, ARM, *requires* all school districts in Montana to "make an identifiable effort to provide educational services to gifted and talented students, which are commensurate with their needs and foster a positive self image," it makes mandatory what section 20-7-902, MCA, makes permissible. As a consequence, the rule conflicts with section 20-7-902, MCA, and exceeds the statutory authority of the Board contained within section 20-2-121(11), MCA.

You also ask whether in light of section 20-7-902, MCA, sections 20-7-101 and 20-2-121(7), MCA, provide authority to promulgate the mandatory rule concerning gifted and talented education. Those sections address accreditation standards and do not singularly focus upon gifted and talented education. Examination of pertinent case law and prior Opinions of the Attorney General reveals that the legislative grant of authority to the Board to adopt standards for accreditation does not include the authority to require every school to initiate an identifiable effort to provide gifted and talented education programs. In Bell v. Department of Licensing, 182 Mont. 21, 594 P.2d 331 (1979), for example, the Montana Board of Barbers and the Department of Professional and Occupational Licensing appealed from an adverse decision of the district court invalidating a rule promulgated by the Board. The Montana Supreme Court determined that while the rule in question did not contradict any specific legislation, it did engraft additional requirements that were not envisioned by the Legislature. In determining that the rule was beyond the scope of the board's power, and therefore void and unenforceable, the Court stated:

> "It is fundamental in administrative law that an administrative agency or commission must exercise its rule-making authority within the grant of legislative power as expressed in the enabling statutes. Any excursion by an administrative body beyond the legislative guidelines is treated as an [sic] usurpation of constitutional powers vested only in the major branch of government." [Citations omitted.]
>
> The courts have uniformly held that administrative regulations are "out of harmony" with legislative guidelines if they: (1) "engraft additional and contradictory requirements on the statute"; [citation omitted] or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature; [citation omitted].

Bell, 182 Mont. at 22-23, 594 P.2d at 332-33. (See also 42 Op. Att'y Gen.

No. 104 at 400, 404 (1988): "Administrative rules must be strictly confined within applicable legislative guidelines [citing Bick, *supra*]."

Also illustrative is Bick v. State, Department of Justice, *supra*, in which the Montana Supreme Court noted, "[I]t is axiomatic in Montana law that a statute cannot be changed by administrative regulation." Bick, 224 Mont. at 457, 730 P.2d at 420, citing Michels v. Department of Social and Rehabilitation Services, 187 Mont. 173, 178, 609 P.2d 271, 273 (1980). See also 39 Op. Att'y Gen. No. 11 at 40 (1981) (board of public education could not, by rule, mandate that all certified teachers complete six in-service credits in Indian studies when the statute, § 20-4-213, MCA, made such requirement discretionary with each local board of trustees).

This principle was recognized and applied in 41 Op. Att'y Gen. No. 23 at 79 (1985). In that opinion the president of the Montana Board of Nursing asked if the board had the authority to require applicants for the professional or practical nursing licenses to hold a specific college degree as a qualification for initial licensure. The Attorney General determined that the board did not have such authority because the Legislature had addressed the issue statutorily, and the applicable statutes did not require applicants to hold a college degree. The opinion held at 82:

> If the Legislature had intended to require nursing license applicants to hold a specific college degree, it would have set forth this requirement in the statutes, as it has done in other license qualification statutes. See, e.g., §§ 37-21-301, 37-7-302, 37-10-302, 37-17-302, MCA. ...
>
> The Montana Supreme Court has held that a rule which engrafts additional, noncontradictory requirements on a statute which were not envisioned by the Legislature is "out of harmony" with legislative guidelines and therefore invalid. See, e.g., Bell v. Dept. of Professional and Occupational Licensing, 36 St. Rptr. 880, 594 P.2d 331 (1979); Board of Barbers v. Big Sky College, 38 St. Rptr. 621, 626 P.2d 1269 (1981). In light of these cases, it is likely that a rule requiring applicants to hold specific college degrees would be viewed by the Court as beyond the Board's rulemaking authority and not reasonably necessary to effectuate the purpose of the statute. See § 2-4-305(6), MCA.

A second issue addressed in the opinion dealt with the authority of the board to adopt the rule under its authority to prescribe standards for schools. The Attorney General concluded that this authority to prescribe standards "does not implicitly or necessarily include the authority to require specific college degrees of nursing school graduates." 41 Op. Att'y Gen. No. 23 at 83.

I conclude that the legislative grant of authority to the Board of Public Education to adopt standards for accreditation contained in sections 20-7-101 and 20-2-121(7), MCA, does not implicitly or necessarily include the authority to require school districts to make identifiable efforts to provide gifted and talented education in view of the discretionary language of section 20-7-902(1), MCA. Like the rule invalidated in Bick, section 10.55.804, ARM, impermissibly engrafts additional and noncontradictory requirements on section 20-7-902, MCA, which were not envisioned by the Legislature.

The Legislature has outlined the scope of education for gifted and talented students in Montana in sections 20-7-901 to -904, MCA. These educational programs must conform to the policies adopted by the Board of Public Education. Although a school district may choose to implement such a program, the Board of Public Education cannot, pursuant to the statutory rulemaking authority addressed herein, require it to do so.

THEREFORE, IT IS MY OPINION:

> The Board of Public Education's rule requiring every school district to make an identifiable effort to provide educational services to gifted and talented pupils, promulgated pursuant to the Board's statutory authority to adopt accreditation standards, conflicts with the provisions of section 20-7-902(1), MCA.

Sincerely,

MARC RACICOT
Attorney General