

TEACHERS' RETIREMENT SYSTEM



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October 10, 2014

TO: Denise Juneau, *Superintendent*, Montana Office of Public Instruction (OPI)
Montana Statewide CSPD Council
Montana Regional CSPD Councils/Directors
Montana Regional Educational Service Area Councils/Directors

FROM: Shawn Graham, *Executive Director*, Montana Teachers' Retirement System (TRS)

RE: **Final Determination of TRS**
Montana's Statewide and Regional CSPDs and RESAs are TRS employers. All eligible employees of each CSPD and RESA must be reported to TRS as active members and/or working retirees.

The following memo is the final determination of TRS, following review of the comments and questions submitted by interested parties in response to the TRS draft determination issued on September 12, 2014. TRS appreciates the comments, questions, and perspectives raised by all responding parties. TRS has provided additional information in this memo in response to the most pressing comments, and will post a more comprehensive FAQ of comments and responses to the new CSPD/RESA page of the TRS website by October 31, 2014.

While TRS understands the interests and perspectives of the responding parties who disagree with the TRS interpretation of applicable law, none of the comments provided information previously unknown to TRS that materially changed the analysis of the TRS-employer status of CSPDs and RESAs. In response to the comments provided, TRS has modified the deadlines for reporting current employees (*hired before August 15, 2014*) and remitting contributions to TRS. In recognition that budgets have already been set for the current fiscal year, TRS will not require reporting of time worked and compensation paid, or remittance of contributions on either active members or working retirees until July 1, 2015. These modified timelines remain subject to the requirement to transfer individuals previously reported to PERS, to TRS, and the rights of individuals to purchase creditable service with TRS for service provided prior to July 1, 2015.

Please Note: the interim memo issued to CSPDs and RESAs on August 12, 2014, regarding application of TRS law to new hires (individuals hired on or after August 15, 2014) remains in effect. Following receipt of the information required to be submitted by CSPDs and RESAs under Section G, below, and completion of the set-up of each CSPD/RESA as an individual TRS employer, TRS will work with each CSPD/RESA to properly, retroactively, credit service and compensation for new hires back to their date of hire. As described in the memo of August 12th, new hires are subject to all TRS requirements and limitations, including the 150 day break in service requirement. If you have new hires and are not sure about their TRS status, please contact TRS immediately.

Over the past year or so, questions have been raised with TRS regarding whether Montana's statewide and regional CSPDs and RESAs are employers who are required to report eligible employees to TRS, and if they are, what individuals employed by them – or engaged as independent contractors – are required to be reported to TRS.

This memo is being issued to clarify the TRS position regarding the TRS-employer status of these entities and the TRS-participant status of their employees. This memo also provides requirements and instructions to facilitate the proper reporting of CSPD and RESA employees to TRS.

The memo contains the following sections:

- A. [What is the role of CSPDs and RESAs in Montana public education?](#)
 - B. [Are CSPDs and RESAs Employers under TRS law?](#)
 - C. [What employees of CSPDs and RESAs must be reported to TRS?](#)
 - D. [What if a CSPD or a RESA fills a position reportable to TRS with an independent contractor or an employee of a third-party?](#)
 - E. [Can the CSPD's or RESA's fiscal agent report to TRS on behalf of the CSPD/RESA?](#)
 - F. [What must a CSPD or RESA do with respect to individuals it now hires in a position reportable to TRS?](#)
 - G. [What if a CSPD or RESA already employs a person \(or engages a working retiree as an independent contractor\) in a position reportable to TRS, and that person is not currently reported to TRS?](#)
 - H. [What if the CSPD/RESA contracts with a private entity to administer the operations and functions of the CSPD/RESA?](#)
 - I. [What will the process be for registering the CSPD/RESA as a separate employer?](#)
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A. What is the role of CSPDs and RESAs in Montana public education?

Based on conversations with staff members of the Office of Public Instruction (OPI), a review of Montana and federal law, and review of materials available on the OPI website, TRS believes the following statements regarding the educational objectives underlying the formation and operation of CSPDs are true and relevant to this discussion:

1. Federal education law, the Individuals with Disabilities Education Act (IDEA and its amendments as set forth in the Disabilities Education Improvement Act of 2004), requires each state to establish a Comprehensive System of Professional Development (CSPD) to help ensure the education, availability, certification, employment, and retention of a sufficient number of educational professionals and related service providers to meet the special education needs of students in the state.
2. Pursuant to federal law, the State Educational Entity (SEA) is responsible for general supervision of special education programs in the State.
3. Pursuant to Montana law, the Superintendent of Public Instruction (Superintendent) is responsible for supervising and coordinating the conduct of special education in Montana, including ensuring that the requirements of the IDEA are met. See *Title 20, chapter 7, part 4, MCA; in particular, §20-7-402, MCA*. The Superintendent and OPI are the State education agency as defined under federal law.

4. The Superintendent is specifically responsible for establishing procedures for the conduct of a comprehensive system of personnel development, including:
 - a. Analysis of state and local needs for professional development for personnel to serve students with disabilities.
 - b. Implementation of a regionalized structure for the implementation of professional development which helps to ensure personnel have the skills and knowledge to improve academic achievement and functional performance of students, and enables personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and where appropriate instruction on the use of adaptive and instructional software.
 - c. A detailed structure for personnel planning that focuses on pre-service and in-service education needs.

See *Rule 10.16.3135(1), Administrative Rules of Montana (ARM)*.

5. The Superintendent is responsible to appoint a CSPD Council to ensure that public and private institutions of higher education and other agencies and organizations having an interest in the preparation of personnel for the education of students with disabilities have an opportunity to participate fully in the development, review, and annual updating of the state comprehensive system of personnel development.
See *Rule 10.16.3135(2), ARM*.
6. In conformity with federal and state law, the Superintendent has appointed a statewide CSPD council and has established 5 regional CSPD councils.
7. The Special Education Division of OPI is the section of OPI that exercises the Superintendent's direct responsibilities regarding the state's comprehensive system of personnel development, including monitoring and oversight.
8. It is TRS's understanding that each regional CSPD has a fiscal agent, which is one of the public school districts or a special education cooperative within its region or a unit of the Montana University System. Each CSPD is included, for OPI reporting purposes, under the legal entity number assigned to the fiscal agent.
9. OPI has indicated that Regional Educational Service Areas (RESAs) are multi-district cooperatives authorized under Montana law. RESAs have very similar educational objectives – professional development – as do the regional CSPDs and have been established by the Superintendent contiguous with the regional CSPDs. The Superintendent's direct responsibilities regarding the RESAs, including monitoring and oversight, are exercised by the Accreditation Division of OPI. [[home](#)]

B. Are CSPDs and RESAs Employers under TRS law?

Pursuant to §19-20-101(9), all of the following are employers for TRS purposes:

- The state of Montana
- A public school district
- The office of public instruction
- The board of public education
- An education cooperative
- The Montana School for the Deaf and Blind
- The Montana Youth Challenge program

- A state youth correctional facility
- The Montana University System
- A community college, or
- Any other agency, political subdivision, or instrumentality of the state that employs a person who is designated a member of the retirement system pursuant to §19-20-302.

As with many public education programs or initiatives that are established, implemented, and overseen by the Superintendent/OPI, which employer category the CSPDs and RESAs would fall into is not entirely clear. CSPDs and RESAs look very much like programs of OPI, as they are "legislatively or administratively created functions, projects, or duties of an agency" (§2-8-301, MCA). The statewide and regional CSPD councils are also clearly identified as component parts of OPI's special education program on the OPI website. However, TRS staff has been told by OPI staff that the CSPDs are not, strictly speaking, a program of OPI.

Even if the CSPD initiative, including the statewide and regional CSPD councils and initiatives are not specifically a program of OPI, it is clear that the CSPDs are an instrumentality of either or both OPI and the public school districts of the state of Montana. While the state of Montana has responsibility to ensure the state's compliance with federal special education law, including establishing a comprehensive system of professional development, local public school districts are the entities primarily obligated to provide appropriate educational services to children with disabilities residing within their districts, and to provide, at public expense, a free and appropriate public education to those children.

There is very little clear legal precedent in Montana regarding how to determine if an entity constitutes an instrumentality of the state or a political subdivision of the state. Public School Districts are political subdivisions of the state of Montana. The determination of instrumentality status may vary based on the purpose for making the determination. For example, the factors for determination of instrumentality status for purposes of applying the public right to know and public participation laws appears to be substantially more liberal than the determination for financial reporting purposes.

For purposes of participation in a public pension plan, the Internal Revenue Service (IRS) has long applied the following criteria:

1. *Is the entity used for a governmental purpose/perform a governmental function?*
2. *Is the performance of its function on behalf of a state or a political subdivision/instrumentality of government?*
3. *Are there private interests involved or does the state or political subdivision involved have the powers and interests of an owner?*
4. *Is the control and supervision of the organization vested in public authority?*
5. *Is express or implied statutory or other authority necessary for the creation and use of such an instrumentality, and does such authority exist?*
6. *What is the degree of financial autonomy and the source of its operating expenses?*

TRS has applied those criteria to the CSPDs/RESAs based on information that is available to TRS.

1. *Is the entity used for a governmental purpose / does it perform a governmental function?*

The provision of a free and appropriate public education, including the provision of special education services to disabled children, is a fundamental right of all children in the United States. The obligation

to ensure provision of such education, including special education services to disabled children, is a governmental obligation/function in each state. The statewide and regional CSPDs and the RESAs were created and are used to address and fulfill a specific public educational obligation of the state of Montana. They are used for a governmental purpose and perform a governmental function.

2. Is the performance of its function on behalf of a state or a political subdivision or instrumentality of government?

The state of Montana and each public school district in the state have some level of administrative, financial, and/or direct service obligation to provide special education services as required by law. This obligation includes insuring that special education services are provided by appropriately educated, trained, and certified education professionals and related service providers. The statewide and regional CSPDs and RESAs perform their functions on behalf of both the state of Montana and of the public school districts within their regions in fulfillment of their obligations under federal and state law.

3. Are there private interests involved or does the state or political subdivision involved have the powers and interests of an owner?

Private entities such as private schools, private membership associations of public educators, etc., and individuals who represent them may participate on the statewide or regional CSPD councils or other advisory/governing boards of the CSPDs and RESAs, may provide funding (in the form of membership or participation fees), or may obtain or purchase services or materials from the CSPDs or RESAs. However, those private interests are intended as subsidiary interests related to the provision of special education services.

Under federal special education law, the state and local public school districts are required to fund, facilitate, and potentially directly provide special education services to disabled children residing within their boundaries, even if those children attend private schools. In addition, the particular objectives of professional development are intended and directed by federal and state law to be met through collaboration and cooperation between the state, public school districts, institutions of higher education, private educational entities, and other individuals and entities involved in the education and training of special education professionals and related service providers, and in the appropriate provision of special education services to disabled children.

The involvement of such private interests in the operation of the statewide and regional CSPDs and RESAs does not change the fundamental nature of the CSPDs and RESAs as creations of federal and state law to fulfill a public educational purpose.

4. Is the control and supervision of the organization vested in public authority?

As discussed above, the obligation to develop and supervise a comprehensive system of professional development is mandated under federal law expressly as an obligation of the state of Montana. Supervision of the CSPD initiative must, by federal law, lie with the State. By Montana statute, the Superintendent is primarily responsible to ensure compliance with the CSPD requirements, and oversight of the CSPD initiative is exercised by OPI.

The creation of the RESA's is authorized by state law and they are operated as a cooperative undertaking of the public school districts located within their geographic regions in order to perform duties and functions of public education.

5. *Is express or implied statutory or other authority necessary for the creation and use of such an instrumentality, and does such authority exist?*

Clearly, express federal and state laws exist mandating and creating the statewide and regional CSPDs. In addition, as discussed, the creation and supervision of a comprehensive system of professional development must lie, pursuant to federal law, with the state of Montana. While private entities, membership organizations, etc., could be created and operated to provide professional development services for special education professionals and related service providers, any such entity would not seem to fulfill the State's express obligation to establish and supervise a comprehensive system of professional development as required under federal law.

The RESAs are created under state law, and by authority of the Superintendent and/or the Board of Public Education to meet professional development requirements or needs related to the provision of public education in the State.

6. *What is the degree of financial autonomy and the source of its operating expenses?*

While TRS has not requested or obtained detailed information regarding all sources of funding for the CSPDs and RESAs, our review of federal and state law indicate that both federal and state educational funding are available, both to OPI and to public school districts, to pay at least a substantial portion of the costs of professional development for special education purposes. While TRS assumes that some amount of funding from private sources may be obtained by the CSPDs and RESAs and expended for their operation, the information available to TRS indicates that a substantial majority of the operational funding of the CSPDs and RESAs is derived from public sources, and specifically from public education funds.

By application of these criteria to the facts known to TRS, ***TRS has concluded that the statewide and regional CSPD council's and the RESAs are, if not component parts of an OPI program, instrumentalities of the state of Montana and/or one or more public school districts. Therefore, the statewide and regional CSPDs and RESAs are employers*** as defined in §19-20-101(9), MCA, and are required to report their eligible employees to TRS. [[home](#)]

C. What employees of CSPDs and RESAs must be reported to TRS?

The statewide and regional CSPDs must report to TRS anyone employed by them in a teaching or an educational services capacity. Essentially, anyone who performs *duties or functions* that would make them reportable to TRS if performing similar work as an employee of a school district, an educational cooperative, or OPI must be reported to TRS by a CSPD or RESA. Additionally, a person who provides training, coaching, instruction, or supervision to educational professionals and/or other individuals regarding the standards and processes to be employed in the provision of special education services would be working in an educational services capacity on behalf of the CSPD or RESA. This would include, but may not necessarily be limited to:

- The primary administrator for a CSPD or RESA
- A teacher
- A paraprofessional
- A related service provider
- A curriculum coordinator or curriculum coach
- A person who provides instruction or coaching to educational professionals or other stakeholders regarding the standards or practices to be implemented in the provision of special

education services or other education services that are the concern of the CSPD or RESA (for example, other educational/instructional standards to be applied/achieved under state or federal law like No Child Left Behind)

TRS understands that, while the operations and functions of all of the CSPDs and RESAs are substantially similar, the job/position titles each uses are independently determined and may vary significantly from region to region. As usual, though, whether or not a position is reportable to TRS is *not* determined based on the title applied to the position, but based on the duties and functions performed.

If there is any question regarding whether a position is reportable to TRS, ***the question must be presented to TRS for determination***. No other individual or entity is qualified or authorized to determine whether a position is reportable to TRS. A determination that a position is reportable to TRS months or years after an individual is hired can have substantial detrimental consequences to the employer and the employee. [[home](#)]

D. What if a CSPD or a RESA fills a position reportable to TRS with an independent contractor or an employee of a third-party?

Under TRS law, an employer has the obligation to establish that an individual filling a position reportable to TRS is actually an independent contractor. If the employer can establish that the person is actually an independent contractor (including as an employee of a third-party), ***and the person is not a TRS retiree***, the person is not eligible to participate in TRS and is not required to be reported to TRS.

However, if a person filling a position that is otherwise reportable to TRS is engaged as an independent contractor (or as an employee of an independent contractor, temp agency, or other third-party), ***and the person is a TRS retiree***, the CSPD or RESA must monthly report to TRS the time worked by and compensation paid to the working retiree and must remit employer contributions to TRS. Employers must be aware that the compensation paid to the working retiree will count against the retiree's TRS earnings limitation and may result in termination of the retiree's monthly retirement benefit while working for the CSPD or RESA.

A CSPD or RESA employing a TRS working retiree, including as an independent contractor, and the working retiree must comply with all other requirements for reporting to TRS, such as, submission of TRS Form 146 and supporting documentation. (See [section G](#) below for more information regarding TRS retirees) [[home](#)]

E. Can the CSPD's or RESA's fiscal agent report to TRS on behalf of the CSPD/RESA?

In the past, many TRS employers who are administered through a fiscal agent, primary agency, or other administrative agency arrangement (including some special education and full service education cooperatives, etc.) have left TRS reporting responsibilities to the fiscal/administrative agent. In some instances, the fiscal/administrative agent has reported the time worked and compensation paid on behalf of the actual employer – the cooperative, the CSPD, etc. – as time worked and compensation paid by the fiscal agent employer entity, particularly where the employees of a fiscal agent are also employees of the cooperative, CSPD, etc.

Based on recent revisions to public pension accounting/reporting requirements applicable to TRS and independently applicable to many of its employers, TRS must now require each individual TRS

employer to be set up as a separate employer in TRS's system with time appropriately reported for each employer. Consequently, the statewide CSPD council and each regional CSPD council and RESA will be required to individually make monthly reports to TRS. This is not to say that the CSPD's/RESA's fiscal agents may not still be responsible for completing the required reporting, but the fiscal agent will have to separately report on behalf of the CSPD/RESA. Because none of the CSPDs or RESAs are currently set up as individual employers with TRS, each will be required to complete an employer registration process with TRS.

F. What must a CSPD or RESA do with respect to new hires in a position reportable to TRS (hired on or after August 15, 2014)?

As communicated in TRS's memo of August 12th, a newly hired employee of a CSPD or a RESA who will work in a position reportable to TRS must be reported to TRS as either an active member or a working retiree, as applicable, from the date of hire. Such new hires who are TRS retirees will be subject to all requirements for termination of employment for eligibility for retirement benefits and to all requirements and limitations applicable to TRS working retirees. This includes that a TRS retiree who retires based on a date of termination of employment on or after January 1, 2014, must fulfill the 150 day break in service requirement before he or she may work for the CSPD or RESA as a working retiree.

It is imperative that CSPDs and RESAs determine the TRS status of new hires (including individuals engaged as independent contractors) to ensure they are not hiring TRS retirees who are not yet eligible to return to work for a TRS employer. Failure to do so may result in substantial adverse financial consequences to the CSPD/RESA and the retiree. Please refer to the memo of August 12th for additional information,

G. What if a CSPD or RESA already employs a person (or engages a working retiree as an independent contractor) in a position reportable to TRS, and that person is not currently reported to TRS?

While TRS law makes clear that CSPDs and RESAs are TRS employers, and that individuals employed by them in TRS-reportable positions must be reported to TRS, whether as active members or working retirees, for various reasons, several of the CSPDs and RESAs may have failed to report some or all of the eligible persons employed by them up to this time to TRS. In fact, in the recent past, based on an administrative scenario described by at least one RESA, TRS advised the CSPDs and RESAs not to take any action to transfer employees from PERS or to begin reporting persons who were not currently reported to any public retirement system pending further notice from TRS.

Based on this final determination of TRS regarding the TRS employer status of CSPDs and RESAs, the status of existing employees of CSPDs and RESAs who are employed – or engaged as independent contractors or employees of third-parties – in positions reportable to TRS must be addressed as described.

Each CSPD and RESA must provide the following information to TRS by January 1, 2015:

1. The CSPD/RESA Regional Designation and other name, if any, under which the CSPD/RESA does business.
2. The name of the CSPD's/RESA's fiscal agent and contact information for the primary contact of the fiscal agent.

3. If the CSPD/RESA has entered into a contract or has otherwise arranged for a third-party, other than the fiscal agent, to manage the administration and operation of the CSPD/RESA, the name of the third-party and contact information for the primary contact of the third-party.
4. A list of affected employees – including independent contractors and employees of third parties – with the following information provided for each employee:
 - Name
 - Last four digits of SSN
 - TRS status (active member or retiree)
 - Date of Hire
 - Employment status (employee, independent contractor, other)
 - Retirement system reported to, if any
 - Time worked by and compensation paid to the individual on a monthly basis since date of hire

Employees who have been reported to PERS

Current employees of CSPDs and RESAs working in TRS-reportable positions who have been reported in error to PERS must be monthly reported to TRS beginning **July 1, 2015**, with employer and employee contributions remitted to TRS. Service credit for time reported in error to PERS will be transferred to TRS pursuant to §19-20-409, MCA. Upon receipt of the information requested above, TRS will notify the employees required to be transferred and will work with PERS to facilitate appropriate transfer of creditable service and contributions. Additional employer and employee contributions may be required due to TRS's slightly higher contribution rates compared to PERS.

Employees who have not been reported to PERS or TRS and are not TRS retirees

Current employees of CSPDs and RESAs working in TRS-reportable positions who have not been reported to TRS or PERS, and who are not TRS retirees, must be monthly reported to TRS beginning **July 1, 2015**, with employer and employee contributions remitted to TRS. These individuals will be entitled to purchase the creditable service for time worked that should have been reported to TRS. Following receipt of the required information, TRS will determine the amount of creditable service the employee is entitled to purchase with TRS and the amount of employer and employee contributions required to make the purchase.

Employees who are TRS retirees

If a TRS retired member is currently employed (hired before August 15, 2014, and including as an independent contractor or as an employee of a third-party) in a TRS-reportable position, the CSPD or RESA and the retired member must complete and submit to TRS, by **January 1, 2015**, a RETIRED MEMBER'S AND EMPLOYER'S NOTICE OF POSTRETIREMENT EMPLOYMENT (TRS FORM 146) and all required supporting documentation. The working retiree must be monthly reported to TRS beginning **July 1, 2015**, and employer contributions must be remitted to TRS. The compensation reported for these working retirees will be counted against their postretirement earnings limitations.

Effective July 1, 2015, these working retirees will be fully subject to the postretirement requirements and earnings limitations set forth in §19-20-731, MCA, including that any of them employed in one or

more positions reportable to TRS for total compensation exceeding their annual earnings limitation will be returned to active member status with TRS as of July 1, 2015. [[home](#)]

H. What if the CSPD/RESA contracts with a private entity to administer the operations and functions of the CSPD/RESA?

Several comments/questions were submitted to TRS regarding the status of a CSPD/RESA that has contracted with or established a separate and/or private business enterprise to actually perform the administrative and operational functions of the CSPD/RESA. Overall, the inquiry of these commenters seemed to be whether, if the CSPD/RESA doesn't have any direct (common law) employees, is it still a TRS employer and is it required to monthly report the time worked by and compensation paid to individuals who are the employees of the separate and/or private business enterprise.

With respect to the TRS employer status, as previously discussed above, each CSPD and RESA is established and operates pursuant to state and federal law as a component part of the public education system in the state of Montana. Regardless how each CSPD/RESA chooses to obtain the services of individuals to perform the duties and functions required of the CSPD/RESA, the character of the CSPD/RESA as a public entity and a TRS employer does not change.

With respect to the individuals who provide services on behalf of a CSPD/RESA but are not claimed as common law employees of the CSPD/RESA, whether or not the individual is reportable to TRS will depend on whether the individual is a working retiree of TRS. Pursuant to 19-20-731(4), MCA, a TRS retiree is "employed in a position reportable to TRS" if the retiree is performing any work or providing any service on behalf of a TRS employer – the CSPD or RESA – even if the retiree is performing the work or providing the service as an employee of a third-party or as an independent contractor.

Therefore, the time worked by and compensation paid to a TRS retiree for service on behalf of a CSPD or RESA must be monthly reported to TRS, and employer contributions must be remitted on the total compensation paid to the individual regardless what entity is or claims to be the actual employer of the employee. The reported compensation will be counted against the retiree's earnings limitation.

TRS does not have the administrative resources to evaluate the validity of an assertion that an individual is not an employee of the CSPD/RESA, but rather is the employee of a third-party or is an independent contractor. TRS will accept the assertion of a CSPD or RESA and an individual that the individual is providing service on behalf of the CSPD or RESA as an employee of a third-party or as an independent contractor upon submission of documentation establishing such status (IC exemption certificate from DLI, documentation of establishment of independent business, etc.) . [[home](#)]

I. What will be the process for registering the CSPD/RESA as a separate employer?

Following receipt of the information required from the CSPD/RESA under section G, TRS will work with each CSPD/RESA to set the CSPD/RESA up as a separate employer with TRS, and to establish any online reporting accounts necessary for each CSPD/RESA or its fiscal agent to monthly report the time worked by and compensation paid to each reportable TRS member/retiree. [[home](#)]

If you have any questions regarding the information in this memo, please contact Shawn Graham, Executive Director of TRS, at (406) 444-3134 or ShawnGraham@mt.gov.