

FAQ

CSPD / RESA Comments and Responses



TRS issued a draft determination regarding the TRS-employer status of Montana's statewide and Regional CSPDs and RESAs on September 12, 2014. In its draft determination, TRS requested comments from interested parties regarding the draft determination, the timelines, and the processes outlined in the draft determination.

Following receipt and review of all comments provided, TRS issued its final determination on October 10, 2014. As indicated in its final determination, none of the comments provided information previously unknown to TRS that materially changed the analysis of the TRS-employer status of the CSPDs and RESAs. In fact, no commenter asserted that the CSPDs/RESAs themselves are not TRS employers.

Other comments provided and considered by TRS prior to issuing its final determination are as follows. Because specific points were raised by more than one commenter, TRS has aggregated similar comments and points into a single representative comment and has provided one response.

1. *Comment: Third-party entities engaged by some CSPDs/RESAs to actually perform the administrative and operational functions of the CSPD/RESA are not TRS employers. Commenters appeared to question, based on the existence of a third-party administrator, whether a CSPD/RESA*
 - a. *ceases to be a TRS employer and/or*
 - b. *whether the employees/independent contractors of the third-party administrator must be reported to TRS.*

As indicated in TRS's final determination (*Section H*) the CSPD/RESA continues to be a TRS employer and the individuals employed/engaged by the third-party administrator to provide service in a position reportable to TRS are reportable to TRS if they are TRS retirees.



2. *Comment: An individual who is engaged directly by a CSPD/RESA as an independent contractor or who is an employee or independent contractor of a third-party administrator should not have to be reported by the CSPD/RESA with respect to the work performed or service provided on behalf of the CSPD/RESA because:*
 - a. *Similar work performed by an independent contractor who is not a TRS retiree is not reportable to TRS and it is discriminatory or otherwise impairs the ability of TRS retirees to compete with other contractors for these positions; and/or*
 - b. *State licensure as a teacher or administrator is not required to provide professional development services.*

It is true that an individual who provides service in a position reportable to TRS on behalf of a CSPD or RESA

- as an independent contractor *or*
- as an employee or independent contractor of a third-party that is not a TRS employer, ***and***

- who is not a TRS retiree,

is not required – or allowed – to be reported to TRS and is not subject to TRS's limitations/requirements for working retirees.

TRS law prohibits double-dipping – circumstances where a TRS retiree concurrently is receiving retirement benefits from TRS and also is employed in a position reportable to TRS earning compensation in excess of the limitations set forth in §19-20-731, MCA. Double-dipping only occurs under TRS law if the individual is a retiree of TRS. The double-dipping prohibition does not apply to someone who comes to Montana after retiring in another state and then goes to work in a TRS reportable position; such individual is not subject to the TRS working retiree requirements/limitations.

Contrary to the assertion that application of TRS law to TRS retirees who return to work for TRS employers as independent contractors is "*discriminatory*," it is, in fact, the equitable and equal treatment of all members of the class of individuals to which TRS law applies. It is also the application of TRS law required to ensure compliance with IRS qualification standards – both with regard to ensuring termination of employment and a bona fide separation from service to be eligible for retirement benefits, and with regard to uniformly applying TRS's plan terms.

Commenters' assertions that individuals engaged by CSPDs/RESAs as independent contractors or as the employees or contractors of a third-party administrator are not reportable to TRS because State licensure or certification is not required for the position are incorrect. TRS law does not limit required participation in the system to individuals who are licensed or certified by the State (§19-20-302, MCA).

With respect to CSPDs/RESAs, which are instrumentalities of the State of Montana (of OPI and/or their constituent school districts), the applicable provisions requiring participation in TRS are stated in §19-20-302(1)(d) and/or (f). Those provisions require an individual employed in a teaching or educational services capacity by OPI, a school district, and/or an education cooperative to participate in TRS. The term "*educational services capacity*" has routinely been applied to include any position that provides service directly in furtherance of the primary educational mission of the employer, including but not limited to:

- positions that provide direct educational services to and supervision of students (including but not limited to teachers, paraprofessionals, principals, superintendents, and related providers (therapists, etc., involved in support of special education students);
- evaluation and testing of students (including but not limited to teachers, professionally qualified persons involved in gifted education, positions involved in IDEA evaluations and the provision of other special education services),
- determination of and training in the curriculum and educational standards to be met by the employer (including but not limited to teacher trainers and curriculum developers and trainers),
- positions involved in the supervision, evaluation and training of teachers or others working in educational services positions,
- and positions involved in administering or supervising the educational services to be provided by a TRS employer (including but not limited to superintendents, principals, or the primary administrator of an education cooperative, curriculum cooperative/consortium, or similar entity).

As discussed at length in TRS's final determination, applicable federal law and state law and policy clearly evidence that Montana's statewide and regional CSPDs and RESAs are component parts of Montana's public education infrastructure and are fundamentally involved in furthering the educational mission of the State of Montana and the CSPDs'/RESAs' constituent school districts. Therefore, any individual providing service or performing work in an educational service capacity on behalf of a CSPD or RESA is employed in a position reportable to TRS and is subject to applicable TRS requirements.



3. *Comment: Applying the 150 calendar day break in service (break in service) requirement to an individual who is engaged as an independent contractor of a CSPD/RESA or as an employee or independent contractor of a third-party administrator is inappropriate because:*
- a. *schools have a limited number of days available for professional development and not having "contractors" available for 150 days negatively impacts the ability of schools to use the expertise of retirees and create smooth transitions or address new, but short term challenges, or to access very specific expertise they may need immediately to maintain quality services to Montana students;*
 - b. *Application of the break in service requirement creates an unfair competitive disadvantage and negatively impacts starting a small business.*
 - c. *Professional development is imperative to the ongoing functioning and improvement of public education in Montana;*
 - d. *Retired Montana educators have the most well-developed skill sets and the expertise necessary to provide the professional development training and coaching required for professional development and mentoring for Montana educators; and/or*
 - e. *TRS retirees have evidenced their commitment to educating Montana's children, the service they provide on behalf of CSPDs/RESAs is sporadic, short-term, and isn't going to make them rich, and TRS should be valuing and honoring the work of long-time educators.*

In order to comply with IRS standards to maintain its qualification as a tax-qualified public pension plan, TRS must ensure that TRS members actually terminate employment in all TRS-reportable positions and have a bona separation from service in order to be eligible for retirement benefits. The IRS's guidance on termination of employment and bona fide separations from service are clear that an employee who "terminates" employment on one date but continues or resumes employment on behalf of a retirement system employer without a bona fide separation from service, **in any capacity**, has not actually retired and may not receive retirement benefits from the retirement system. The IRS, in various guidances, has stated that the provision of service on behalf of the employer, but now as the employee of a third-party or through an employee leasing arrangement or other similar arrangement, would defeat the termination of employment required for a retirement system member to be eligible for retirement benefits. The IRS has referred to such circumstances as "sham" retirements.

TRS is obligated to give effect to the IRS requirements with respect to all TRS retirees on an equitable basis. The rational application of the available IRS guidance would indicate that postretirement employment in the capacity of

- a consultant,
- an employee or contractor of a third-party administrator,
- an independent contractor,
- a volunteer, or
- under any other designation or capacity by which a TRS employer would obtain the services of a TRS retiree

would be subject to the requirements for termination and bona fide separation from service. It is certainly the required application if TRS is to treat all members and retirees equally and equitably.

The Legislature passed and TRS has implemented a uniform break in service requirement of 150 calendar days for all TRS members who retire based on a date of termination on or after January 1, 2014. The

provision of any service or performance of any work on behalf of a TRS employer, in any capacity, within the 150 calendar day break in service period is prohibited, except if:

- the retiree provides service as a substitute for a classroom teacher in conformity with the criteria set forth in §19-20-734(2)(a) MCA, or
- the retiree is continuing employment in a position reportable to the Montana Public Employees' Retirement System (PERS) in which the retiree was appropriately reported to TRS prior to and at the time of retirement with TRS.

In light of TRS's obligation to comply with IRS qualification standards, the TRS Board and staff, the Governor, and the Montana Legislature work diligently to ensure that TRS's plan provisions (i.e. the statutes and administrative rules that govern the benefits and administration of TRS) meet IRS requirements. TRS works diligently to ensure that those requirements are applied uniformly and consistently (which is, itself, a qualification requirement).

TRS has no authority to apply its postretirement employment limitations and requirements to independent contractors or employees of third-party administrators who are not TRS retirees. Though this fact may encourage CSPDs/RESAs or their third-party administrators to prefer to engage individuals who are not TRS retirees as independent contractors, that is not an issue that is within TRS's purview.

TRS both recognizes and values all of our members' contributions to public education. TRS exists for the express purpose of providing lifelong retirement security to all of the individuals who have made a career in public education on behalf of the State of Montana. In order to continue that commitment on behalf of all of TRS's current and future members, retirees and their beneficiaries, TRS must:

- Continue to ensure actuarially sound funding of the retirement system,
- Continue to comply with IRS tax-qualification standards,
- Continue to uniformly and equitably apply TRS's plan terms, and
- Uniformly and equitably pay plan benefits

TRS's application of law to CSPDs and RESAs as stated in its final determination is the correct, appropriate, and equitable application of law. TRS does not have the authority to grant exceptions to uniformly applicable law for specific groups of retirees or for specific groups of employers.



4. *Comment: Requiring the CSPDs/RESAs to make employer contributions on TRS retirees engaged by the CSPDs/RESAs as independent contractors or employed or engaged by third-party administrators is inappropriate because:*
- Professional development funds are limited and requiring employer contributions creates an undue burden on limited funds and reduces the amount of actual services provided to benefit Montana students;*
 - Since employer contributions are required only on individuals who are TRS retirees, TRS retirees and the entities that employ them are at a competitive disadvantage over non-TRS-retiree providers;*
 - The retirees obtain no increase in retirement benefits from the employer contributions; and/or*
 - By requiring contributions on working retirees who are independent contractors, TRS is behaving as if the retiree is an employee of the entity that engages him/her and is creating an employment relationship that doesn't exist and could subsequently be used against both the retiree and the engaging entity.*

TRS understands the perspective of commenters that requiring employer contributions on TRS retirees who provide services on behalf of CSPDs and RESAs may be financially burdensome. Since July 1, 2013, all TRS employers have been required to make employer contributions on the compensation paid to working retirees in TRS reportable positions. It is a requirement that TRS must apply uniformly and consistently to all employers who use the services of TRS retirees.

Over the past several years, TRS has seen a substantial increase in the frequency of employers filling TRS reportable positions with working retirees, and more specifically, with working retirees who are identified as independent contractors or employees or contractors of third-parties. The result of having TRS-reportable positions filled by TRS retirees and/or by independent contractors is an erosion of the retirement system's funding base. In addition, allowing TRS retirees to fill TRS-reportable positions as independent contractors could have the effect of allowing those TRS retirees to bypass TRS provisions intended to prevent double-dipping and to ensure equitable distribution of retirement benefits to all TRS members. Finally, this may result in a violation of IRS requirements for termination of employment and bona fide separation from service.

It is absolutely correct that a working retiree receives no additional retirement benefit from the employer contributions made on a working retiree. Rather, the benefit to the TRS retiree of postretirement employment, subject to TRS's limitations, is that the retiree continues to receive retirement benefits while also receiving some amount of compensation from postretirement employment in a position reportable to TRS. While the working retiree does not earn any additional benefit, he/she also does not make any additional contributions to TRS. The employer contributions on working retirees are merely an additional employer contribution required to adequately fund the retirement system for services no longer being performed by an active, contributing member of TRS.

Requiring employer contributions on a working retiree who is identified as an independent contractor or as an employee or contractor of a third-party administrator does not treat the individual as an employee of the employer, does not "create" an employment relationship that does not exist, and does not establish a "position" regarding the employment status of the individual that could subsequently be used against both the retiree and the employer. TRS law specifically states (§19-20-731(4) MCA)

"For purposes of this section (note: for purposes of applying TRS's postretirement employment requirements and limitations), the term 'employed in a position that is reportable to the retirement system' includes any work performed or service provided by a retired member to or on behalf of an employer, including but not limited to work performed or service provided ... as an independent contractor."

There are specific legal analyses applied to determine whether an individual is, in fact, an employee or an independent contractor of a hiring entity. No application of TRS postretirement employment requirements or limitations would fulfill the legal analysis required to make that determination, nor are they intended or applied by TRS to fulfill that analysis.



5. *Comment: The primary regional administrators – whether called Executive Directors, Coordinators, Program Coordinators, or by any other position/job title – of the various CSPDs/RESAs are not positions reportable to TRS because*
 - a. *They perform administrative functions similar to those of a school district clerk;*
 - b. *They are employed by entities that receive funding from grants, and other entities that receive the same or similar grant funds have been determined by TRS to not be TRS employers; and/or*

- c. *If the administrator is an independent contractor, the CSPD or RESA has no control over how or when the administrator performs his/her work, so could not report hours worked.*

Based on the position/job descriptions received by TRS and the stated objectives and obligations of the statewide and regional CSPDs and RESAs as set forth in state and federal law, TRS believes that some or all of the following generally stated responsibilities and duties likely apply to the primary administrators for each CSPD/RESA:

- Knowledge of federal and state educational standards with which the school districts are required to comply
- Knowledge of the methodologies and best practices applicable to professional development in public education
- Knowledge of federal and state requirements and standards for the State's comprehensive system of professional development
- Duty to communicate applicable educational standards, methodologies and best practices to stakeholders
- Duty to organize, authorize, and/or oversee professional development classes, programs and training opportunities on educational standards, methodologies and best practices
- Duty to document eligibility for and obtain continuing education and/or OPI renewal units for the CSPD's/RESA's educational offerings
- Duty to coordinate and collaborate with other regions, with stakeholders, and with OPI to establish and maintain a consistent and sufficient program for professional development across the state
- Duty to create and represent reports to evidence eligibility for grant funding and compliance with program requirements
- Duty to interact with and report to OPI regarding CSPD or RESA activities, and compliance with program and grant requirements

As discussed in #2 above, an individual may be employed in an educational services capacity even if the position they fill performs mostly administrative functions. TRS law does not limit eligibility, or the requirement, to participate in TRS to individuals that actively teach or interact with students. Rather, an individual is employed in an educational services capacity if the individual provides service directly in furtherance of the primary educational mission of the employer.

Based on the duties and functions that apply to the primary administrators of the CSPDs/RESAs, it appears clear to TRS that these individuals are fundamentally involved in identifying and understanding federal and state educational standards, methodologies and best practices for providing professional training to promote understanding and implementation of those standards; administering the CSPD's/RESA's program for meeting the professional development needs of its constituent school districts pertaining to those standards; and creating and providing information and documentation evidencing the CSPD's/RESA's appropriate and required provision of professional development services.

It is TRS's understanding that the individuals in these positions act as far more than mere clerical functionaries. Rather, their duties and functions are analogous to those of

- a director of a special education cooperative,
- a director of a curriculum cooperative,
- a curriculum coordinator or professional development coordinator employed directly by a school district or an education cooperative, or
- an OPI staff member responsible for similar duties and functions related to professional development on a statewide basis,

all of whom are required to be reported to TRS.

It is true that other entities provide professional development and mentoring and are not subject to TRS requirements. In order for an individual to be reportable to TRS, two requirements must be fulfilled:

- The individual must be providing service in a TRS reportable position (*i.e. performing duties and functions that, without consideration for the employment status of the individual, would make the individual eligible to participate in TRS*), and
- The individual must be providing service on behalf of a TRS employer (*which must be a public entity*).

As already discussed in this FAQ, the position of the primary administrator for a CSPD or RESA is a TRS-reportable position. As discussed in the TRS final determination memo, the CSPDs and RESAs are public entities and are TRS employers. While other entities may meet criteria and receive funding through the same state and/or federal grants that fund the statewide and/or regional CSPDs and RESAs, if they are not public entities, they are not TRS employers and are neither eligible nor required to report their employees to TRS.

While the source of funding is one of the factors in determining whether an entity is an instrumentality of the State and a TRS employer, as described in TRS's final determination memo, the receipt of funding from public sources does not, on its own, establish an entity's status as a TRS employer. The receipt of public funding does not make a private entity a public entity, nor does the fact that funding is available to both public and private entities have any impact on the public entities' status, or their obligations to TRS.

One commenter indicated that similar grant funding is available, and/or that similar functions are performed by the Institute for Educational Research and Service (IERS), MEA-MFT, School Administrators of Montana (SAM), etc., and they are not being held to the same standards. IERS, MEA-MFT, and SAM are not public entities and not subject to TRS requirements. If individuals employed by IERS, MEA-MFT, and SAM are TRS retirees and providing service in a position reportable to TRS on behalf the statewide or a regional CSPD or RESA, the retirees would be reportable by the CSPD/RESA as working retirees. While all entities are not, and cannot, be held to the same criteria, in the manner clearly meant by the commenter, all TRS employers and individuals providing services on their behalf are consistently and correctly held to the criteria set out in TRS law.

With respect to the difficulty the CSPDs and RESAs might have in correctly reporting the time worked by their employees, the issue is no different than for any employer who must track and report time worked by employees or contractors who work substantially independently and with infrequent verification of work hours, etc. Each CSPD/RESA will have to develop sufficient internal processes to ensure full and correct reporting of time and compensation, and to ensure appropriate remittance of employer contributions on working retirees who are independent contractors or employees or contractors of third-party administrators.