

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

**MONTANA QUALITY EDUCATION
COALITION,**

Plaintiff,

v.

**MONTANA OFFICE OF PUBLIC
INSTRUCTION; and ELSIE
ARNTZEN, in her official capacity as
SUPERINTENDENT OF PUBLIC
INSTRUCTION,**

Defendants.

Cause No.: BDV-2024-201

**PRELIMINARY INJUNCTION
MOTION ORDER**

Before the Court is the Montana Quality Education Coalition’s (“MQEC”) preliminary injunction motion. The Montana Office of Public Instruction (“OPI”) and the Superintendent of Public Instruction (“Superintendent”) oppose the motion. A show cause hearing was held April 8, 2024. For the reasons stated below, MQEC’s motion is **GRANTED**, in part, and

1 **DENIED**, in part.

2 **FINDINGS OF FACT**

3 1. In 2023 the Legislature passed HB 549 the Public Charter
4 Schools Act, subsequently signed by Governor Gianforte, which authorized
5 establishment of public charter schools, codified in Title 20, Chapter 6, Part 8
6 (“the Act”).

7 2. In March 2024, OPI published a document titled “Public
8 Charter Schools Guidance” which stated that new charter schools must follow the
9 statutory school opening process in Title 20, Chapter 6, Part 5. Specifically, OPI
10 stated that new charter schools must submit a form to OPI including requested
11 documents. Most relevant here is OPI’s requirement for the Average Number
12 Belonging (“ANB”) for each school, the estimated or actual number of students
13 provided by the county superintendent.

14 3. MQEC filed suit against OPI and Superintendent, seeking
15 preliminary and permanent injunctions, declaratory relief, and alleging
16 unconstitutional infringement of Board of Public Education (“Board”) power, and
17 unconstitutional redelegation of legislative authority.

18 4. MQEC filed the instant motion for a preliminary injunction
19 on April 3, 2024.

20 5. The Court also denied MQEC’s temporary restraining order
21 motion but did set the requested expedited hearing date.

22 6. A show cause hearing was held Monday April 8, 2024.

23 7. At the hearing, Chair of the Montana Board of Public
24 Education Dr. Tim Tharp and Corvallis School District Superintendent Pete
25 Joseph testified on behalf of MQEC. Neither OPI nor the Superintendent called

1 any witnesses.

2 8. Tharp testified about the Board's development of a charter
3 school evaluation process and the ultimate signing of contracts with nineteen
4 proposed public charter schools on a schedule that would allow applicant schools
5 adequate time to commence operations by July 1, 2024, the effective
6 commencement date of signed contracts.

7 9. Joseph testified about the numerous problems that have
8 arisen from OPI's last minute raising of concerns. Joseph testified that the
9 County has already signed contracts and spent money under the belief that the
10 charter schools had full and ultimate approval, and that had OPI raised its
11 concerns earlier his district would have addressed them.

12 **PRELIMINARY INJUNCTION STANDARD**

13 The 2023 Legislature substantially altered when a district court
14 may issue a preliminary injunction. Specifically, Mont. Code Ann. § 27-19-201
15 now provides:

16 (1) A preliminary injunction order or temporary restraining order
17 may be granted when the applicant establishes that:

18 (a) the applicant is likely to succeed on the merits;

19 (b) the applicant is likely to suffer irreparable harm in the
20 absence of preliminary relief;

21 (c) the balance of equities tips in the applicant's favor; and

22 (d) the order is in the public interest.

23 (2) An injunction order may be granted in either of the following
24 cases between persons, not including a person being sued in that
25 person's official capacity:

1 (a) when it appears that the adverse party, while the action is
2 pending, threatens or is about to remove or to dispose of the
3 adverse party’s property with intent to defraud the applicant, in
4 which case an injunction order may be granted to restrain the
removal or disposition; or

5 (b) when it appears that the applicant has applied for an order
6 under the provisions of 40-4-121 or an order of protection
under Title 40, chapter 15.

7 (3) The applicant for an injunction provided for in this section
8 bears the burden of demonstrating the need for an injunction order.

9 (4) It is the intent of the legislature that the language in subsection
10 (1) mirror the federal preliminary injunction standard, and that
11 interpretation and application of subsection (1) closely follow
United States supreme court case law.

12 Mont. Code Ann. § 27-19-201 (2023).

13 “No single factor is dispositive; rather, the court must balance them
14 collectively to determine whether an injunction should issue.” *Rhodes v Ohio*
15 *High Sch. Ath. Ass’n*, 939 F. Supp. 584, 587 (N.D. Ohio, 1996) (citing authority)
16 (district court concluded that a fifth-year high school student was not entitled to a
17 preliminary injunction after high school association determined the eight-
18 semester rule precluded him from playing football).

19 A preliminary injunction does not resolve the merits of the case.
20 *See Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont.
21 342, 16 P.3d 342 (citing *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295,
22 298 (1995)). It is error for a district court to determine the ultimate merits of the
23 case at the preliminary injunction stage. *Yockey v. Kearns Props., LLC*, 2005 MT
24 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185. (citations omitted) (emphasis added).
25

1 **ANALYSIS**

2 MQEC argues that the Board holds sole authority to permit a
3 charter school to operate. OPI and Superintendent counter that OPI retains
4 jurisdiction over charter school opening and that MQEC lacks standing for its
5 constitutional claims.

6 As a preliminary matter, MQEC’s simultaneous brief did not
7 address the “standing defense” but, at this stage in this proceeding, the Court
8 makes no determination as to that issue.

9 **Whether MQEC is Likely to Succeed on the Merits**

10 MQEC argues the Board has exclusive authority over the
11 formation of public charter schools. OPI counters that it retains ultimate authority
12 on whether a charter school may open.

13 First some necessary context. All public schools in Montana have a
14 code, issued by OPI, which facilitates budgeting and other administrative matters.
15 Funding is distributed to school with codes under a formula, part of which is the
16 ANB, the official figure for the attendance at a public school (estimated or
17 actual).

18 The Legislature passed the Act to provide “other public
19 educational opportunities for all students,” enable parental choice, and enhance
20 the State’s educational system, among other purposes. The statutory scheme
21 places the Board in general supervision over all public charter schools and the
22 specific supervision and control of local trustees:

23 It is the legislature's intent to establish public charter schools that are
24 under the supervision and control of trustees who are elected by qualified
25 electors pursuant to Article IV, section 2 [“Qualified elector”], and
Article X, section 8 [“School district trustees”], of the Montana

1 constitution”

2 Mont. Code Ann. § 20-6-802(2). (2023)

3 “It is the legislature's intent to create innovative and high-performing public
4 charter schools under the general supervision of the board of public
5 education and under the supervision and control of trustees of the governing
6 board who are elected by qualified electors in the community where the
7 charter school is located.

7 Mont. Code Ann. § 20-6-802(3) (2023).

8 The board of public education shall monitor the performance and legal
9 compliance of each public charter school district and each public charter
10 school....

11 Mont. Code Ann. § 20-6-809(4)(a) (2023).

12 The board of public education has the authority to conduct or require
13 oversight activities...

14 Mont. Code Ann. § 20-6-809(4)(a) (2023).

15 Public charter school’ means a public school that: ... (h) operates under
16 the general supervision of the board of public education in accordance
17 with its charter contract;....

18 Mont. Code Ann. § 20-6-803(9) (2023).

19 The Board is the entity charged with the formation and
20 establishment of public charter schools:

21 In accordance with this part, the board of public education is responsible
22 for executing the following essential powers and duties: (a) soliciting and
23 evaluating charter proposals; (b) approving charter proposals....

24 Mont. Code Ann. § 20-6-804(1) (2023).

25 “Charter contract” means a fixed-term, renewable contract between a

1 governing board of a public charter school and the board of public
2 education that outlines the roles, powers, responsibilities, and
3 performance expectations for each party to the contract.

4 Mont. Code Ann. § 20-6-803(3) (2023).

5 A public charter school may not open without a contract and those
6 contracts are entered into by the Board:

7 “Public charter school” means a public school that: ... (c) is established
8 and operated under the terms of a charter contract;....”

9 Mont. Code Ann. § 20-6-803(9) (2023).

10 A public charter school may not commence operations without a charter
11 contract executed in accordance with this section and approved in an
12 open meeting of the board of public education.

13 Mont. Code Ann. § 20-6-806(5) (2023).

14 Indeed, the Court found no mention of either OPI or the
15 Superintendent anywhere in HB 549 or the statutes into which it was codified.
16 Public charter schools are manifestly under the general supervision of the board
17 of public education.

18 Nevertheless, Title 20, is generally applicable to public charter
19 schools:

20 Except as provided in this part and in the public charter school's charter
21 contract, a public charter school is subject to the provisions of Title 20
22 and any state or local rule, regulation, policy, or procedure relating to
23 noncharter public schools within the located school district.

24 Mont. Code Ann. § 20-6-811(1)(c) (2023).

25 A public charter school is responsible for meeting the requirements of a
local educational agency under applicable federal, state, and local laws,
including those relating to special education.

1 Mont. Code Ann. § 20-6-811(3) (2023).

2 A public charter school is subject to the same civil rights, health, and
3 safety requirements applicable to other public schools in the state except
4 as otherwise specifically provided in this part.

5 Mont. Code Ann. § 20-6-811(7)(a) (2023).

6 Furthermore, nothing in the Act expressly removed the
7 Superintendent’s seemingly concurrent “general supervision of the public
8 schools,” including the power to “approve or disapprove the opening or
9 reopening of a school in accordance with the provisions of 20-6-502, 20-6-503,
10 20-6-504, or 20-6-505;....” Mont. Code Ann. § 20-3-106 (2023).

11 At the hearing, OPI and Superintendent focused primarily on OPI’s
12 need to receive the ANB from new charter schools as part of its process assigning
13 school codes and allocating funding. The Court generally agrees with OPI and
14 Superintendent that the Act does require that “[f]or budgeting and funding
15 purposes, when a public charter school is operated by a local school board, a
16 public charter school must be considered a separate budget unit of the located
17 school district, must have its ANB calculated separately from other budget units
18 of the district....” Mont. Code Ann. § 20-6-812 (2023).

19 OPI and Superintendent argue that OPI must enforce the school
20 opening statutes in Title 20, Chapter 6, Part 5 before a public charter school may
21 commence operations. In this regard, those statutes require approval from the
22 local trustees and requires that “[t]he superintendent of public instruction shall
23 investigate the application for the opening or reopening” of a high school or
24 junior high school. Mont. Code Ann. § 20-6-503 and -504 (2023). The statute for
25 opening an elementary school oddly does not require such an investigation, but

1 requires elementary school opening on (1) a petition from “parents of at least two
2 pupils,” (2) County Superintendent review, (3) County Commission approval,
3 and (4) Superintendent approval. Mont. Code Ann. § 20-6-502 (2023).

4 Applications for any school type are due by June 1 so that OPI
5 may approve or disapprove by late June. The Court notes that approval by late
6 June is compatible with the July 1 opening date in the contracts but offers little
7 time to cure errors. None of these statutes clarifies what OPI is reviewing or the
8 criteria for acceptance or rejection, and OPI cites to administrative rule wherein it
9 promulgated such criteria or the subjects of review.

10 To compound the confusion, the Act provides that the Board “may
11 establish reasonable preopening requirements or conditions to monitor the startup
12 progress of a newly approved public charter school to ensure that the school is
13 prepared to open smoothly on the date agreed and to ensure that each school
14 meets all building, health, safety, insurance, and other legal requirements for
15 school opening,” Mont. Code Ann. § 20-6-806(6), but also that “[a] public
16 charter school is subject to the same civil rights, health, and safety requirements
17 applicable to other public schools in the state except as otherwise specifically
18 provided in this part,” Mont. Code Ann. § 20-6-811(7)(a). Read together, it does
19 not appear that the Board’s requirements displace the opening requirements of
20 OPI, rather that the Board is authorized to establish its own requirements to
21 ensure compliance with the civil rights, health, and safety requirements generally
22 applicable to all schools. Indeed, the Act’s use of the term “preopening” and that
23 sentence’s focus on compliance with requirements outside the Act weigh against
24 a conclusion that the Board has exclusive authority over public charter schools. It
25 is noteworthy that the statutes use the term “general,” not “exclusive,” when

1 defining the scope of the Board’s supervision. The concerns raised by OPI and
2 Superintendent, however, do not relate to building, health, insurance, civil rights,
3 health, or safety, but rather to OPI’s data collection surrounding ANB and
4 budgeting. Indeed, OPI’s “Public Charter Schools Guidance” is overwhelmingly
5 concerned with ANB/budget issues and directs questions and concerns to OPI’s
6 School Finance Division of the Office of Public Instruction.

7 At the hearing the parties seemingly agreed that OPI’s review and
8 approval of charter schools was ministerial, except to the extent that OPI believed
9 elementary schools opening required a parental petition, trustee approval, county
10 superintendent approval and county commissioner approval. OPI stated that if
11 given the ANB numbers it could rapidly issue school codes and calculate
12 budgets. OPI made no indication that it had the intention or discretionary power
13 to reject an application if it contained the requisite information, namely ANB. It
14 appears at this juncture that OPI’s role as to ANB and budget allocation is
15 ministerial in nature.

16 At this juncture, the Court accepts that OPI must be provided the
17 ANB before it can legally issue school codes, at a minimum as a matter of
18 practicality and seemingly as a matter of law. The Act could have given the
19 Board exclusive supervision over public charter schools, but it did not. The Act
20 could have exempted public charter schools from the other provisions of Title 20,
21 but it instead expressly applied Title 20 to charter schools. The Act could have
22 authorized the Board to open public charter schools, but it did not use that
23 language. Furthermore, the Act uses distinct terms, implying nonexclusive
24 concurrent jurisdiction: OPI is charged with opening, the Board with *preopening*;
25 the Board *establishes* schools, OPI *opens* them. “Where the Legislature used

1 different language in the same connection in related statutes, it is presumed it
2 intended a different meaning and effect.” *Bullock v. Fox*, 2019 MT 50, ¶ 59,
3 395 Mont. 35, 435 P.3d 1187. “It is presumed that the legislature is acquainted
4 with the law; that it has knowledge of the state of it upon the subjects on which it
5 legislates; that it is informed of previous legislation and the construction it has
6 received.” *Baitis v. Dept. of Revenue*, 2004 MT 17, ¶ 24, 319 Mont. 292, 83 P.3d
7 1278. Until the Legislature clarifies the boundaries of such a concurrent
8 relationship, this Court must “ascertain and declare what is in terms or in
9 substance contained” in the statutes, which requires that these different terms be
10 given different meaning. Mont. Code Ann. § 1-2-101 (2023).

11 Moreover, “[w]hen a general and particular provision are
12 inconsistent, the latter is paramount to the former, so a particular intent will
13 control a general one that is inconsistent with it.” Mont. Code Ann. § 1-2-102
14 (2023). Here the Act is a newer and more particular provision which, when
15 understood as a whole Act, was expressly passed as a dramatic departure from,
16 and exception, to the previously existing Montana public education statutory
17 scheme.

18 Based on the above, it appears MQEC is likely to succeed on the
19 merits of its declaratory judgment claim as to Mont. Code Ann. § 20-6-502’s
20 requirement for a parental petition, county superintendent approval and county
21 commissioner approval but not as to sections 20-6-502, -503, and -504’s
22 requirement for OPI approval, namely the requirement for schools to provide OPI
23 with ANB numbers. The Court believes this interpretation is favored because it
24 retains the possibility to harmonize the statutes raised by both parties. Mont.
25 Code Ann. § 1-2-101 (2023) (“Where there are several provisions or particulars,

1 such a construction is, if possible, to be adopted as will give effect to all.”).

2 **Irreparable Harm**

3 Mr. Joseph’s affidavit and testimony sufficiently establishes that
4 OPI and Superintendent’s refusal to issue school codes irreparably harms the
5 district’s ability to hire staff, develop curriculum, and plan enrollment for the
6 school year given the rapidly approaching June 1 deadline for application to OPI.
7 MQEC members are likely to suffer irreparable harm if forced to engage in the
8 approval process as interpreted by OPI, which may nevertheless be impossible to
9 comply with given the time required for county commission approval and late
10 hour of this dispute. Moreover, the irreparable harm to those students counting
11 on starting their public charter school education in 2024 should be undisputed by
12 the parties. Above all, the students’ best interests should come first which seems
13 to have been forgotten by the parties as they slash their legislative interpretation
14 sabers at one another.

15 **Equities Balance**

16 Two outcomes are possible: MQEC prevails, and the Court directs
17 OPI to assign school codes or OPI prevails and MQEC member schools must
18 abide by OPI’s process as a condition to receiving a school code, the requirement
19 for a parental petition, and county commissioner approval. If the Board is
20 ultimately wrong the schools will have to engage in the process as interpreted by
21 OPI. If OPI is ultimately wrong they will not. Either outcome will still require the
22 schools to provide OPI with ANB (whether estimated or actual) at the very least
23 as a practical matter of school administration and funding, if not as a legal
24 requirement. Based on the prior analysis regarding the likelihood of prevailing,
25 the balance of equities lay with requiring school compliance with OPI’s

1 requirement to submit ANB, but not with requiring a parental petition, county
2 superintendent approval or county commission approval.

3 **Public's Interest**

4 The Court accepts as axiomatic that it is in the public interest for
5 duly enacted Montana statutes. This dispute, however, pits one statutory scheme
6 of Board supervision of charter schools against another statutory scheme of OPI
7 supervision over school opening. In this context, the Legislature's new
8 requirement that an injunction be in the public interest forces this Court to
9 balance the public interest of two seemingly contradictory statutory schemes
10 before the Court has even decided the merits. Furthermore, there is no clear status
11 quo when the dispute is an intra-statutory conflict presented by the
12 implementation of a new law. Mindful of judicial activism criticism, this Court
13 must note that in this dispute, the new preliminary injunction standard quite
14 literally requires this Court to make the kinds of policy calls about the public
15 interest which are generally the exclusive province of the legislature, and which
16 Courts avoid strenuously if not strictly required by law.

17 Without ruling on the merits, and exclusively for the purposes of
18 this preliminary injunction, the Court concludes that it is in the public interest to
19 require compliance with OPI's school opening statutes except to the extent that
20 they require a parental petition, county superintendent approval and county
21 commission approval. OPI's interpretation may entirely derail charter schools'
22 opening even if OPI is incorrect on the merits. Conversely, if the Board's
23 interpretation is ultimately determined to be incorrect, OPI will still be provided
24 the ANBs and OPI can still engage in its school opening process. It is in the
25 public interest to favor an interpretation which does not have a chance of

1 irrevocably derailing the opening of public charter schools, over an interpretation
2 which may unnecessarily prevent the opening of properly established public
3 charter schools. More fundamentally, it is in the public interest not to allow an
4 interpretation of law which may be incorrect from preventing the opening of
5 schools authorized by the Legislature, established by the Board, and chosen by
6 hundreds if not thousands of students and their families.

7 **ORDER**

8 Based on the above, the Court hereby **ORDERS, ADJUDGES,**
9 **AND DECREES** that MQEC’s preliminary injunction motion injunction is
10 **GRANTED IN PART, DENIED IN PART;**

11 OPI is preliminarily **ENJOINED** from requiring compliance with
12 the parental petition, county superintendent approval and county commission
13 approval provisions of Mont. Code Ann. § 20-6-502 as a condition to issuing
14 schools codes and other support provided by OPI to charter schools. Such
15 provisions directly interfere with the Legislature’s directive under the Act to the
16 Board relative to public charter schools.

17 **ELECTRONICALLY SIGNED AND DATED BELOW**

18
19 cc: Elizabeth A. Kaleva, via email
20 Kevin A. Twidwell, via email
21 Elizabeth O’Halloran, via email
22 Tara A. Harris, via email
23
24
25