LEGAL REVIEW NOTE

Bill No.: HB 329

LC#: LC611, To Legal Review Copy, as of January 21, 2021

Short Title: Establish the Students with Special Needs Equal Opportunity Act

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

HB 329 establishes the "Students with Special Needs Equal Opportunity Act" (the "Act"). Section 1. The Act creates a special needs education savings account program that is administered by the Office of Public Instruction ("OPI"). The program is available to a "qualified student" as defined in Section 3(7). Under the program, the parents of a qualified student sign a contract with the superintendent of public instruction that ″release[s] the [qualified student's] resident school district from all obligations to educate the qualified student." Section 5.

Following the receipt of a signed contract, OPI notifies the resident school district of the student's participation in the program. OPI also informs the district of the amount of money the school district must remit monthly to OPI because the district is no longer obligated to educate the student. Section 9(1). Ninety-five percent of the amount received by OPI is placed in a "special need equal opportunity education savings trust" for the student and 5% is placed into a statutorily appropriated administration account for OPI. Section 9(4). The school district remits that amount to OPI from August through May for as long as the student participates in the program. Section 9(2).

The money remitted by the school district "must be from the district's general fund" and "may not include revenue from the guarantee account provided for in 20-9-622." Section 9(3). Money in a student's savings account is paid to the student's parent on a reimbursement basis for "allowable educational expenses". Allowable expenses include:

- qualified school tuition, fees, textbooks, software, or other instructional materials or services;
- an educational program or course using electronic or offsite delivery methods, including but not limited to tutoring, distance learning programs, online programs, and technology delivered learning programs; and
- curriculum, including supplemental materials necessary for the curriculum.

Section 4. Parents must provide to OPI "copies of receipts for allowable educational resources for reimbursement." Section 5. OPI must then "promptly" reimburse parents. Section 9(6). On a student's 24th birthday, the student's account is closed and any remaining funds in the student's account are returned to the guarantee account provided for in 20-9-622. Section 9(6).

Prohibited Payments

HB 329, as drafted, may raise potential constitutional issues associated with Article VIII, section 14, of the Montana Constitution. Article VIII, section 14, provides: "Except for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof."

While administration funding is statutorily appropriated to OPI, there is no appropriation for parental reimbursement for allowable education expenses from the savings trust created under Section 10. The question is whether money in the trust can be paid without an appropriation.

In the past, the Supreme Court has ruled that Article VIII, section 14, does not apply to certain funds that are "not derived by taxation." For example, in *Huber v. Groff*, 171 Mont. 442, 558 P.2d 1124 (1976), the plaintiff challenged the Housing Act of 1975, which allowed for the issuance of revenue bonds. The Housing Act provided that proceeds from the bond sales would be placed in trust and "handled by a trustee". The plaintiff argued that the sale of bonds and the use of trust indenture funds without an appropriation violated Article VIII, section 14. The Montana Supreme Court, however, disagreed, holding that Article VIII, section 14, did not apply to the trust indenture funds because: (1) the trust indenture funds did not derive from taxation; and (2) they were not deposited with the state treasurer. *Huber,*171 Mont. at 460.

The *Huber* Court explained: "Section 14 relates to the method of handling the deposits of (f) state monies. The money raised here by the sale of bonds becomes a special fund to be disbursed for the erection of proposed buildings. This money is not derived by taxation and consequently need not be handled in that manner." *Id*., quoting *Geboski v. Montana Armory Board*, 110 Mont. 487, 493, 103 P.2d 679, 682 (1940).

In HB 329, OPI is depositing money from a resident school district into a "special need equal opportunity education savings trust". The money from the trust is later paid out to a parent once the parent submits receipts for allowable educational resources pursuant to a contract. Although HB 329 provides that the money remitted to OPI is from a school district's general fund, and therefore it could be argued the money is not state money, this money is, in large part, "derived from taxation". Therefore, paying tax dollars from the trust to reimburse parents without an appropriation may potentially implicate Article VIII, section 14.

Control of the State

HB 329, as drafted, may also raise a potential constitutional conformity issue associated with Article V, section 11(5), of the Montana Constitution. Article V, section 11(5), provides: "***No appropriation*** shall be made for religious, charitable, industrial, educational, or benevolent purposes ***to any private individual***, private association, or private corporation not ***under control of the state***." (Emphasis added.)

As stated in the section above, there is a question whether money in the trust must be appropriated. If so, the potential constitutional conformity issue raised is whether the education savings account program as outlined in HB 329 is sufficiently "under the control of the state." Under the program, OPI must reimburse parents for allowable educational expenses, which includes payments made to qualified schools. The legislation also provides that, apart from reporting requirements, a qualified school is "not an agent of the state or federal government." Section 8(2). HB 329 also provides that: "Neither the superintendent of public instruction nor any other state agency may regulate the educational program of a qualified school that enrolls a qualified student, except as provided under 20-5-109." Section 8(3).

The issue of "state control" has been discussed in prior Montana Supreme Court cases. For example, in *Grossman v. State*, 209 Mont. 427 (1984), the plaintiff contended that legislation authorizing the issuance of bonds for the department of natural resources and conservation's development of hydroelectric power violated Article V, section 11(5), because some private entities could benefit from cheap power. The Montana Supreme Court discounted this argument, stating: "The constitutional provision is not violated because the legislation may in making appropriations or other provisions in some way benefit incidentally various private individuals, associations or corporations not under the control of the state. As long as the provisions related to the expenditure of funds derived from the proceeds of the bonds are under the control of the state, the constitutional mandate is satisfied." *Grossman*, 209 Mont. at 455-56.

The Montana Supreme Court has concluded that public assistance to indigent expectant mothers

is not an unconstitutional appropriation under Article V, section 11(5), simply because a mother may request the counseling and assistance of a private adoption agency. *Montana State Welfare Bd. v. Lutheran Social Services*, 156 Mont. 381, 390-91 (1971).

However, in *Hollow v. State*, 222 Mont. 478 (1986), the Montana Supreme Court considered legislation that permitted the use of in-state investment funds derived from taxation to guarantee loans or bonds of private individuals or entities was not permitted. According to the Court, the pledge of state credit to the benefit of private entities offended Article V, section 11(5), and was constitutionally impermissible. *Hollow*, 222 Mont. at 485-86.

HB 329, as drafted, requires OPI to administer a program that reimburses private individuals for making payments to a private entity that is expressly not under the control of the State according to the Act. While the Act also makes clear that the monthly remittance may not include revenue from the guarantee account provided for in 20-9-622, there may be other state dollars in a school district's general fund being used to reimburse parents for payments to a qualified school that is not under the control of the state, which may potentially implicate Article V, section 11(5).

Requester Comments:

"The legislature finds that expanding special needs educational opportunities within the state is a valid public purpose to ensure equal educational opportunity for all children with special needs." HB 329, pages 1-2.

The purpose of HB 329 is to benefit the State by serving the educational needs of Montana elementary and secondary students with special needs who may receive less than an equal educational opportunity within the state's system of public schools or who may need a different method of receiving educational services to be truly equal to any Montana student enjoying educational opportunities. To achieve this purpose, HB 329 seeks to establish the Students with Special Needs Equal Opportunity Act, an education program in harmony with the legislature's authority found in Article X (Education and Public Lands), Section 1 (Educational Goals & Duties), subsection (3) of the Montana Constitution.

The Legal Review Note (the Note) analyzing HB 329, dated January 25, 2021, raises two issues for consideration:

1. Whether HB 329 could be found to conflict with Montana Constitution Article VIII, section 14, which reads,

> **Prohibited payments.** Except for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof;

2. Whether HB 329 could be found to conflict with Montana Constitution Article V, section 11(5), which reads,

> **Bills.** (5) No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.

Neither Article can be read in a bubble – context matters. Article VIII ("Revenue and Finance") speaks to the limitations of government in handling state finances; Section 14 ("Prohibited Payments") restricts the ability of anyone to take money from the state treasury drawn by an appropriate government actor. Article V (The Legislature") defines limits on legislative authority; section 11(5) ("Bills") restricts the legislature's ability to appropriate money directly to a private person, association or business that is "not under control of the state."

Prior to the Constitutional Convention of 1972, the latter phrase restricted appropriations to private persons and entities not under "absolute control" of the state. [Montana Constitution of 1884, Article IV (Legislative Department), Section 35.] This change in the constitution recognizes that if the state has absolute control, the person referenced in this section could only be a ward of the state, and the association or business referenced could not be defined as "private" if the state had absolute control.

For purposes of this review, it is noteworthy to point out that, "control of the state" must mean something less than "absolute control" where a person or entity could not otherwise function without direct control or operation by state actors exercising the power of the state.

Prohibited Payments

Article X, Section 1, subsection (3) of the Montana Constitution gives authority to the legislature to provide educational programs in addition to the state's basic system of public education:

> The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

In HB 329, the legislature establishes an educational program, as authorized by the Montana Constitution. Just as the legislature appropriates funds to the Office of Public Instruction (OPI) to provide Montana's basic system of public schools, in HB 329 the legislature appropriates funds to provide an educational program authorized by the same education article of the state constitution that authorizes the legislature to provide a basic system of public schools. After receiving appropriations, OPI has a duty to make payments to education providers in a manner prescribed by the legislature. It is therefore unnecessary for any additional or separate appropriations to be made by the legislature for the implementation of HB 329.

I. The appropriation for HB 329 is proper and accountable.

The appropriation for public schools is based on a count of each student living within a district's boundaries who is enrolled, or entitled to be enrolled, in the public school. The appropriation for the ESA program is based on each qualified student living and counted within a district's boundaries who opts to be educated through the ESA program.

The appropriation for public schools is directed to and received by OPI. After receiving the appropriation, OPI directs disbursement of those funds according to parameters established by the legislature. Public schools determine which teachers to hire, and which vendors to employ to provide various services required by students – within rules and guidelines established for public schools by state and local laws and rules. For the ESA program, parents, on behalf of their children, determine which vendors to employ to provide various services required by their children, which tutors to hire, and which educational facility to provide instruction, whether that is fulltime enrollment in an online or private school or part-time participation in select classes in a public school. These decisions are also governed by rules and guidelines established for the ESA program and for education providers, generally, by state and local laws and rules.

Both parents and vendors are strictly controlled in the expenditure of ESA funds. The ESA education program lists very specific spending boundaries that must not be crossed. Parents are free to choose educational resources they deem to be the best fit for their children's educational needs, yet parents and vendors are under control of the state regarding the expenditure of monies funding those educational resources, which, according to the court in *Grossman v. State Dept. of Natural Resources, 209 Mont. 427, 682 P.2d 1319 (1984),* meets constitutional guidelines.

II. Children are the beneficiaries of HB 329 not the private sector.

A parent benefits by having funding for education and therapies necessary for a child's success. The direct benefit for a parent is the joy of being able to access educational opportunities that will help the child learn and eventually live a happy and successful adult life.

Education vendors benefit only insofar as the education services they provide are fairly and adequately compensated. The benefit for those vendors is simply the opportunity to provide their services to students who need those services. A parent has no obligation under the ESA education program to use ESA funding for payment of private school tuition, e.g., a parent may ensure that the child is fully educated by using ESA funding for classes at a public school and free online curriculum that the parent may teach at home. HB 329 offers educational opportunities; there is no mandate to choose only nonpublic resources or only one type of educational resource. Needs of the student, rather than a particular education sector, will guide a parent's choices.

III. The mechanism for appropriation in HB 329 is proper.

Funds appropriated to OPI for public schools are disbursed to specifically identified fund accounts for each public school district. Thereafter, funds appropriated to OPI for public schools are remitted back to OPI in an amount sufficient for disbursement to specifically identified trust accounts for each student who has elected to participate in the ESA program.

Funds are appropriated by the legislature to OPI for public schools and the ESA program; thereafter, transferring money between accounts to fund students' education is an administrative function. There is no need for an additional appropriation of funds that have already been appropriated. Language in HB 329 directing how OPI must administer funds allocated to the ESA program is clearly sufficient, and consistent with prior funding appropriations for education.

OPI is tasked with administering the delivery of education for students enrolled in public schools. The legislature is not required to make a separate appropriation to the parent of each student requesting enrollment in a public school. It is commonly recognized that whereas funding for public schools is based primarily on each student enrolling in a public school, no separate appropriation to the parent or to the school board of trustees is necessary. This is an administrative duty of OPI to ensure fund payments are distributed to education programs and schools as directed by the legislature.

Control of the State

The Note questions whether separate appropriations to pay education expenses from students' participating trusts is required by the Constitution, whether such appropriations would violate Article V, Section 11(5) of the Constitution, which disallows appropriations made for educational purposes "to any private individual, private association, or private corporation not under control of the state."

"Appropriation" means an authority from the lawmaking body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the state." *Nicholson v Cooney*, 265 Mont. 406 (Mont. 1994), 877 P.2d 486

I. HB 329's appropriation is for the state-required education for the student and any temporary benefit to a parent is in fulfillment of a public good.

HB 329 directs OPI, using funds from a student's participating trust, to reimburse a parent who pays for qualified education expenses for a child. When OPI reimburses the parent, OPI is performing an administrative function, making payments from previously appropriated public school funds that were generated by the student to fund the ESA education program. Participating trusts fund a child's education within the parameters of the ESA education program; to the extent that a private individual – a parent – receives funds, it is only in fulfillment of the parent's designated role within the ESA education program. The object of the appropriation is the state-required education of the student, whether the student chooses a public school or another method of learning using resources available through the ESA program.

Although parents receive a financial benefit from state appropriations that fund public schools and education programs like the ESA program, those funds serve a public purpose and deliver a public good for a general class of citizens: K-12 students.

II. Expenditure of ESA funding in HB 329 is under state control.

The Note stresses that, if funding for the ESA education program must be separately appropriated for participating trusts, then a question arises whether such appropriations are made for educational purposes to a private individual, private association, or private corporation; if so, the Constitution requires that the entity receiving the appropriation be "under control of the state." The Note confuses, (a)

whether funding of reimbursements from participating trusts (including but not limited to funding for education services provided by qualified nonpublic schools) means that qualified nonpublic schools would need to be under control of the state, with (b) whether the education program would need to be under control of the state.

The Note takes an expansive view of appropriations and their subsequent uses by those receiving funding from appropriations. OPI receives appropriations to fund the state's system of public schools; clearly, OPI is the state and public schools are state-operated schools which allow locally elected residents, who volunteer their time, to exercise control over vital functions (public school boards of trustees). Public school boards of trustees, which receive funds from the state and determine how those funds are to be utilized by their public schools, are composed of independent citizens elected to the school boards who may not be "the state" per se, yet the way they make expenditures from funds appropriated to OPI and later distributed to the public schools is clearly under control of the state.

As noted earlier, "under control of the state" must mean less than something which is state-operated. In *Grossman v. State Dept. of Natural Resources*, 209 Mont. 427 at 456 (Mont. 1984), 682 P.2d 1319, the court held,

> "The constitutional provision is not violated because the legislature may in making appropriations or other provisions in some way benefit incidentally various private individuals, associations or corporations not under the control of the state. As long as the provisions relating to the expenditures of the funds . . . are under the control of the state, the constitutional mandate is satisfied." At 456

Funding of the ESA, as explained in HB 329, clearly shows that the state controls the way funds may be expended. There is a specific list of qualified education resources that are eligible for purchase, there are specific contractual obligations for parents and participating providers, OPI exercises direct oversight of program expenditures, and failure to meet fund expenditure requirements or failure to adhere to specific program requirements will result in exclusion from the program.

Justice Baker, in her dissent in *Espinoza v Montana Dept of Revenue,* 393 Mont. 446 (Mont. 2018), 435 P.3d 603, 2018 MT 306, spoke clearly regarding the difference between an appropriation, which can only be done by a law-making body and cannot be made to a private individual or entity, versus payments, "made by the Executive Branch carrying out its appropriated spending authority, for example, by spending on contracts or by awarding grants."

Two authors publishing in the Montana Law Review reveal conflicts in Montana's case law regarding when payment of public funds to a private entity is constitutionally permissible. The authors said that in some cases, ". . . although the public funds are ultimately used by private parties for their business purposes, the appropriation of public funds is to a public entity – one controlled by the state – and therefore no impermissible gift or appropriation exists." *State ex rel. Normile v. Cooney,* 100 Mont. 391, 47 P.2d 637 (1935); *Douglas v. Judge,* 174 Mont. 32, 568 P.2d 530 (1977); and *Grossman v. State Dept. of Natural Resources,* 209 Mont. 427, 682 P.2d 1319 (1984).

The authors went on to conclude, "It seems disingenuous of the court to find, as it did in *Hollow* and in *White*, impermissible appropriations to private parties not under control of the state, when in *Douglas* and *Grossman* the court held the appropriations were to the state agency that allocated the money to the private parties." *Hollow .v State*, 100 Mont. 391, 47 P.2d 637 (1935), *White v. State*, 233 Mont. 81, 759 P.2d 971 (1988); *Douglas v. Judge; Grossman v. State Dept. of Natural Resources.* Mae Nan Ellingson and Jerry C. D. Mahoney, *Public Purpose and Economic Development: The Montana Perspective,* 51 Mont. L. Rev. (1990).

HB 329 requires OPI to administer a program using funds appropriated to OPI by the legislature for allocation by OPI to public schools and then, if necessary, to the ESA program for those students who are eligible so that they may receive equal educational opportunity. OPI receives the appropriation, then administers the program in the manner outlined in HB 329, which ensures that the manner of expenditure of public funds will be sufficiently controlled by the state for the public purpose and good of providing equal educational opportunity for certain children with special needs.