

MINUTES OF THE HOUSE EDUCATION COMMITTEE  
January 28, 1981

The House Education Committee convened at 12:30 p.m. on January 28, 1981, in Room 129 of the State Capitol with Chairman Eudaily presiding and all members present.

Chairman Eudaily opened the meeting to a hearing on HB 347.

HOUSE BILL 347

REPRESENTATIVE WILLIAM RAE JENSEN, District 25, chief sponsor, said the bill deals with expanding the time allotted for religious release time. He said the first religious release time was in Gary, Indiana, in 1914. By 1955, 33 states and the District of Columbia permitted such programs. By 1966, 47 states were allowing religious release time. Religious release time permits elementary students time to leave school in order to attend religious instruction classes off the school premises and only at the request of the parents. He said Montana is one of the few states that does not permit five hours of time a week. Rep. Dassinger was successful in getting the law passed to allow two hours a week. Rep. Jensen said two hours are not enough at the high school level which is why this bill to expand it to five hours. He said he wanted to emphasize that the school participates in no way. Whoever promotes this would provide a place adjacent to the school and the student would be released from a regular study hall one period a day to attend class here. He read three letters from out of state telling how this has successfully worked. He said they are not asking for credits. He said these teenagers are full of energy and we all know what they are faced with in the way of influences and environment on the T.V., newspapers and magazines. He said the students are overwhelmed with all this at this period of their life. He said the least we could do in the State of Montana is to allow religious organizations to put a facility near enough so the student can spend an hour a day studying the Bible or church history. He said he couldn't understand why anyone would oppose the idea.

SENATOR J. A. TURNAGE, District 13, spoke on behalf of the bill. He said he wished to emphasize this is not a new concept as the Legislature has already approved the philosophy of release time. This would ask to have it at the high school level by expanding the two hours to five. He said there was opposition to a similar bill last session and it was killed on third reading. Arguments then were based on the constitutional question as to whether it is permissive under the First. He said that issue has been settled as the existing law is on the books. If it was a real constitutional question it would have been challenged before now. He passed to the committee members an excerpt of a decision given by U.S. Supreme Court Justice Douglas in 1952 when there was a challenge to the First Amendment. He upheld the constitutionality of the law. A copy of this is EXHIBIT 1. Senator Turnage read the excerpt.

Chairman Eudaily asked if anyone had questions to ask of Senator Turnage as the Senator was needed at another meeting. Rep. Teague asked if it would be better to say a "period" rather than an "hour." Senator Turnage said it should be tailored to the school's program and if a period is 50 minutes that is what it should be.

SENATOR GARY LEE, District 17, urged the approval of the bill.

JACK SHARP, resident of Helena, said he would like to add his support to the bill. He said the supreme court deciding for released time should be sufficient and there was also another case in the Court of Appeals in Virginia that did not choose to reverse the decision. He said he would like to have the opportunity for his children to attend religious instruction in a released time situation.

DAVID MAUGHAN, Helena, representing self, said he has been on the school board for several years. He said he does not feel it would interfere with school activities. He said in listening to the hostages remarks one of the things that helped them was their convictions and thinking about their families. He said this kind of a program enhances those kinds of thoughts and brings families closer together and helps develop young people we can depend on when they are like we are.

CARL HATCH, Helena, representing self, said he would like to go on record as being in support of the bill. He said he was concerned about moral training.

BEN EVANS, Helena, representing self, said he had spent some time on the school board. When the nation and school system were founded there was a lot of discussion about a fear of leaving God out of things - now the fear is of letting God in. We are not teaching what we should as far as behavior and morality are concerned. He said schools feel they can't teach the morality end of it. He said he would like to go on record as supporting the bill.

DAVE SEXTON, Montana Education Association, spoke as an opponent. He said they are not opposed to religious instruction. He said they have philosophical and constitutional questions about the existing law that gets right to the heart of the separation of church and state. Students who are released to attend still will be counted as students in attendance at public schools. He said there are also practical considerations. He said there are 168 hours in a week of which the school has only 30. So, this instruction could be held after school or on week-ends and should not encroach on school hours. He said the class period missed could be the period when a required subject is taught. He said there are so many demands on the schools with extra curricular activities and this would add one more they didn't feel necessary. He said the schools set aside one night a week when no homework or activities are scheduled for the churches. He said this bill was rejected in the 1979 legislature and they thought for good reason. He said there is also the legal

question of liability when the student is on the way to and from and while at. The way the law is written the school is still responsible. He urged rejection of the bill.

WAYNE BUCHANAN, Montana School Boards Association, said they agree with Mr. Sexton. He said he would like to point out that there are two hours permitted now in the law. It says it is permissive but he said from experience he knows the pressure mounts, and there would be a number of groups who would come to the school board and want five hours. He said the students would need special exams. He felt the supreme court decision was discriminatory for children who don't belong to a religious group. He said in 1979 there was an extensive and bitter floor fight on this. He asked that the bill be ended with the committee so this won't happen again.

Rep. Jensen closed. He said the religious release time bill had a lot of discussion on 2nd and failed on 3rd in the House even though the majority of the representatives favored the bill. He said why it failed was that the school organizations put a letter on every desk (which is against the rules of the House) and had superintendents call and put pressure on the representatives from their district. Rep. Jensen said there is nothing discriminatory about the bill as anybody is welcome. He said two hours just doesn't work into a high school schedule, and these hours would not interfere with scheduling as it would be a study period or an elective subject period. He said if he had a child or student under his direction he would see that he chose all the necessary subjects and schedule around them. He said Jan Brown, Montana Association of Churches, had left a letter with him (EXHIBIT 2), supporting the bill. The Montana Association of Churches Position Statement is EXHIBIT 3 - some points from it were used by the proponents.

Questions were asked by the committee. Rep. Azzara said he was inclined to support the bill. He said there didn't seem to be a problem with liability with the released time now as the children were covered by accident insurance. Mr. Buchanan said the reason there hasn't been any problem is that the release time is usually scheduled for a Thursday or Friday afternoon and the whole student body is dismissed. But, he felt, during school time they are under the responsibility of the school. Rep. Azzara suggested putting in an amendment dealing with liability.

Rep. Hannah said in a school at which he was familiar they had an athletic program scheduled for the last period of the day for all the athletes. He said they had no problem in accommodating the schedule for that period. Could you adopt the policy of the last period of the school as a special activity time? Mr. Buchanan said for the most part this is not done. Athletics are scheduled in lieu of physical education classes and that is part of the school education program.

Rep. Williams felt it would result in indirect support of church as the one period a day would come out to be 25 days a year when these kids are not in school. He felt it could end up costing the district ANB funds. Rep. Jensen said the release time would only come where an elective is scheduled or a study hall, and sports would come under the same category.

Rep. Kitselman said he was having trouble following the necessity of having this during the classroom hours. He said most schools dismiss at 3:30 and there is the week-ends. He said a school he was familiar with had a bus that took bussed students involved in athletics at 6:30. He feared the ones that are drug users, etc. aren't interested in this kind of program. Rep. Jensen said a high school that has 150 or so students that desire this kind of education could attend a facility close to the school with a paid instructor in their free period. He said all the students 14 to 18 are under the drug, etc. influences every day. This might give some of them the strength to stay away from them.

Rep. Vincent asked if we are not really talking about the way the release time is going to be used. He said if you add up all the time the kids are away for other things like appointments and other extra curriculums it would amount to a far greater amount of time than would be used in this kind of thing. Mr. Buchanan said five hours a week is a lot of time. He questioned just how well a unitarian center would work - he felt each church would want their own. Rep. Vincent questioned if the majority of the kids would use this to its fullest extent. The response was that Conrad has 40% using its religious release time. Mr. Buchanan said there are abuses whenever you have students with an open pass as there is no way to keep track of them. Rep. Azzara asked if you couldn't ask for documentation. Mr. Buchanan said it is more or less effective depending on who the administrator is. It can be controlled but it is very complicated.

Rep. Dussault said she has problems believing that even the Catholic communities could agree on one instructor. Rep. Jensen said he can only base this on the experience he has had and the correspondence he has received - the concept is working. He said it is permissive with the school board - the program works or the school board says no. He said through experience they have found that most students going to these classes are better students.

Chairman Eudaily questioned how much pressure comes on the board and so how much control they would have. Rep. Jensen said if the people approach the board with a good program that makes sense the board shouldn't feel under pressure. Chairman Eudaily felt the parents should sign a release quarterly rather than yearly to help keep a better handle on things.

Rep. Lory asked why do you need five hours when you already have two hours in the law. Rep. Jensen said to fit into the schedule

of most high schools which are divided into periods.

Rep. Hanson asked Mr. Sexton how he felt about the bill. Mr. Sexton said so many demands are already being made on the classroom hours that are school related. If the trend continues to take on things of a private nature, what time will be left for what the school is intended for.

Rep. Dussault said she couldn't understand why the parents are so concerned, why the option of a parochial school is not used and why this instruction cannot occur after school. Mr. Sharp responded he visualized the release time being used during a study hall or elective period with the parents' permission and their own desire for religious instruction and they would like to have it for five hours - one period a day during which time they could go to a nearby facility and attend classes from an accredited teacher in a classroom situation.

#### EXECUTIVE SESSION

HOUSE BILL 157 - In response to a question Mr. Bob Stockton of the OPI said they can pay it even though we have to borrow to pay. Our concerns at times is that they don't know what they owe and it has thrown the state's cash drawer into the red. Rep. Hannah asked if this means they go into the secondary market and pay prevailing interest. The answer was no. Mr. Stockton said primarily they have 20% reserve for transportation and it should be 35%.

Chairman Eudaily asked if the school districts that request this could receive it. Mr. Stockton said they would need a few more FTEs to get that done.

Rep. Andreason said in his notes he has that instead of borrowing to pay as the money is received. Mr. Stockton said there is no way to do this as it is a direct appropriation.

Rep. Hannah moved DO NOT PASS. The motion carried with the following Representatives voting no: Andreason, Vincent, Dussault, Azzara and Teague. Reps. Donaldson and Anderson were absent at this time.

Rep. Hannah asked if there was some way this situation could be handled. Mr. Stockton said school districts do not get their money until late and he said he is concerned about certain areas and spoke to the sponsor of the bills. He said the sponsor did not take the time to check into amendments.

HOUSE BILL 158 - Mr. Bob Stockton, OPI, said the present five payments were arrived at through a joint effort of the Department of Administration and Department of Revenue studying the cash flow. He said this bill takes the June payment and has it made

in March when most of the material hasn't come in yet. If the money needed isn't in the fund they have to borrow from other funds. He said this also happens with the September payment as they would be paying without knowing what we are paying for, so there are two payments in the blind and corrections may need to be made. He said cash flow is the problem.

Rep. Lory moved DO NOT PASS. He said all this would do is reduce the reserve fund for the district. He felt they would like to use the reserves to make short term investments and invest in CDs.

Rep. Hanson said the school would like to have this money earlier so they can invest it. They think the state is setting on their money and drawing big interest.

The question was called and the motion carried 14 in favor and 1 opposed (Teague) and 2 absent (Donaldson and Anderson).

HOUSE BILL 178 - Rep. Hanson moved DO PASS. Rep. Vincent suggested some amendments: page 14, line 3, section 2 on appointments - have 2 from the Montana House of different parties and 2 from the Montana Senate of different parties and the governor pick two. The legislators would be from the respective educational committees. Rep. Hanson withdrew his motion and moved that the amendment suggested by Rep. Vincent be adopted and also on page 14, line 10, to strike "shall" and insert "may."


Rep. Williams questioned if this would be overloading the committee with legislators who might not have the needed background in education. Rep. Vincent said if the legislators are sitting on the Education Committee they are usually someone with some expertise and interest in education.

The question was called and the motion carried unanimously with those present (absent were Reps. Donaldson and Anderson).

Rep. Dussault moved the bill DO PASS AS AMENDED. This motion carried with 13 voting for and 2 opposed (Reps. Meyer and Hannah) and two absent (Reps. Donaldson and Anderson).

Rep. Williams moved the meeting adjourn and the meeting adjourned at 2:35 p.m.

Respectfully submitted,

  
RALPH S. EUDAILY, CHAIRMAN

MR. JUSTICE DOUGLAS OF THE SUPREME COURT WHEN HE GAVE THE MAJORITY OPINION IN THE SUPREME COURT LANDMARK CASE, ZORACH V. CLAUSON (343 US 306, 1952). HE SAID, "WE ARE A RELIGIOUS PEOPLE WHOSE INSTITUTIONS PRESUPPOSE A SUPREME BEING. WE GUARANTEE THE FREEDOM TO WORSHIP AS ONE CHOOSES. WE MAKE ROOM FOR AS WIDE A VARIETY OF BELIEFS AND CREEDS AS THE SPIRITUAL NEEDS OF MAN DEEM NECESSARY. WE SPONSOR AN ATTITUDE ON THE PART OF GOVERNMENT THAT SHOWS NO PARTIALITY TO ANY ONE GROUP AND THAT LETS EACH FLOURISH ACCORDING TO THE ZEAL OF ITS ADHERENTS AND THE APPEAL OF ITS DOGMA. WHEN THE STATE ENCOURAGES RELIGIOUS INSTRUCTION OR COOPERATES WITH RELIGIOUS AUTHORITIES BY ADJUSTING THE SCHEDULE OF PUBLIC EVENTS TO SECTARIAN NEEDS, IT FOLLOWS THE BEST OF OUR TRADITIONS. FOR IT THEN RESPECTS THE RELIGIOUS NATURE OF OUR PEOPLE AND ACCOMMODATES THE PUBLIC SERVICE TO THEIR SPIRITUAL NEEDS. TO HOLD THAT IT MAY NOT WOULD BE TO FIND IN THE CONSTITUTION A REQUIREMENT THAT THE GOVERNMENT SHOW A CALLOUS INDIFFERENCE TO RELIGIOUS GROUPS. THAT WOULD BE PREFERRING THOSE WHO BELIEVE IN NO RELIGION OVER THOSE WHO DO BELIEVE. GOVERNMENT MAY NOT FINANCE RELIGIOUS GROUPS NOR UNDERTAKE RELIGIOUS INSTRUCTION NOR BLEND SECULAR AND SECTARIAN EDUCATION NOR USE SECULAR INSTITUTIONS TO FORCE ONE OR SOME RELIGION ON ANY PERSON. BUT WE FIND NO CONSTITUTIONAL REQUIREMENTS WHICH MAKE IT NECESSARY FOR GOVERNMENT TO BE HOSTILE TO RELIGION AND TO THROW ITS WEIGHT AGAINST EFFORTS TO WIDEN THE EFFECTIVE SCOPE OF RELIGIOUS INFLUENCE."

*Harold Bick 247*  
*1. 10. 31*

*W. H. R. 13*

# Montana Association of Churches

MONTANA RELIGIOUS LEGISLATIVE COALITION • P.O. Box 1708 • Helena, MT 59601

January 27, 1981

## WORKING TOGETHER:

American Baptist Churches  
of the Northwest

American Lutheran Church  
Rocky Mountain District

Christian Church  
(Disciples of Christ)  
in Montana

Episcopal Church  
Diocese of Montana

Lutheran Church  
in America  
Pacific Northwest Synod

Roman Catholic Diocese  
of Great Falls

Roman Catholic Diocese  
of Helena

United Church  
of Christ  
Montana Conference

United Presbyterian Church  
Glacier Presbytery

United Methodist Church  
Yellowstone Conference

United Presbyterian Church  
Yellowstone Presbytery

Rep. Ray Jensen  
House of Representatives  
State Capitol  
Helena, MT 59601

Dear Rep. Jensen:

Because of a prior commitment, I will be unable to attend the House Education Committee's hearing on H.B. 347 tomorrow, so I wanted to submit some comments to you.

In 1976 the Montana Association of Churches adopted a position paper supporting the concept of released time for religious education. The paper stressed that any legislation adopted should be permissive rather than mandatory. Such a bill was passed by the 1977 legislature. Following passage of the bill, the Montana Association of Churches assisted in distributing information to school districts detailing how released time programs could be implemented.

Our position paper did not specify the number of hours we thought a school district ought to make available for religious education, but stressed that the program be a local option. Therefore, the Montana Association of Churches can support House Bill 347, because it merely raises the maximum number of hours from two to five that a school district board of trustees may make available for religious education for high school district pupils. Released time for religious education remains a decision of the local districts' boards of trustees, and this bill simply allows them more flexibility in deciding how much time may be used.

Sincerely,



Jan Brown  
Legislative Liaison



## POSITION STATEMENT

The Montana Association of Churches supports the concept of released time for religious instruction. The Association urges the next Montana Legislative Assembly to pass a Released Time bill which will allow local school districts to adopt a Released Time program should the citizens of the district choose to do so.

We encourage the Legislature to enact a permissive bill which will set the basic parameters of the program but will not mandate the school districts to implement. The matter should be one of local option.

## SUPPORTING STATEMENT

The first released time program for religious instruction was instituted in Gary, Indiana in 1914. By 1925, 33 states and the District of Columbia permitted such programs and by 1966 the number of states had increased to 47.

Very simply, released time programs permit elementary and secondary public school pupils to leave school during regular school hours in order to attend religious instruction classes. Such classes are held off the public school premises and students are released from school only by the request of their parents. Public school officials take no part in the programs, but merely provide for the students' dismissal.

Released time programs have been the subject of U.S. Court decisions at least three times. In 1948, in *McCormick v. Board of Education*, the Supreme Court ruled that a program of released time that included the use of an Illinois school building was unconstitutional on the grounds that it violated the First Amendment to the U.S. Constitution.

In 1952, however, the high Court ruled in *Zorach v. Clauson*, 343 U.S. 396, 72 S. Ct. 678, that a New York City program allowing public school students to be released for religious instruction by parental request did not violate the First Amendment.

The deciding principle between the two decisions lay in the use of public school property in *McCormick* and the lack of use of such property in *Zorach*. According to the *McCormick* and *Zorach* decisions, released time programs are constitutional when religious instruction classes are held off public school property and conversely, unconstitutional when conducted on public school property.

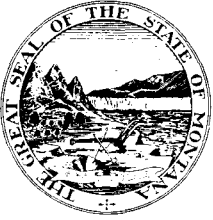
The most recent court action involving released time programs occurred in 1975. In *Smith v. Smith*, No. 75-1478, action was brought to challenge a released time program whereby public school students were released during school hours for religious instruction held off school premises by nonprofit organizations and supported by a council of churches. The United States District Court of Appeals for the Western District of Virginia at Harrisonburg granted injunctive relief and

Ex. 1

STATE OF MONTANA

# Office of the Legislative Auditor

STATE CAPITOL  
HELENA, MONTANA 59620  
406/449-3122



JAMES H. GILLETT, C.P.A.  
ACTING LEGISLATIVE AUDITOR

January 26, 1981

JOHN W. NORTHEY  
STAFF LEGAL COUNSEL

Representative Eudaily  
House Chambers  
State Capitol  
Helena, Montana 59620

Dear Representative Eudaily:

Per your request, I have enclosed information regarding post-secondary educational costs of inmates of state correctional institutions.

If you have any questions or if we can provide any additional assistance please contact me.

Sincerely,

A handwritten signature in cursive script that reads "James Gillett".

James Gillett  
Acting Legislative Auditor

JG/jaa

Enclosure

# M E M O R A N D U M

TO: Jim Gillett /

FROM: Wayne Kedish, Lorry Sether, and Jim Manning *Manning*

RE: Postsecondary Education Costs for Inmates of State Correctional Institutions.

Per your request, we submit the following information concerning postsecondary education costs for inmates of state correctional institutions.

## Montana State Prison (MSP)

The General Fund appropriation is the only source of funds that are available or have been used to pay postsecondary education costs of any prisoner at MSP. The following schedule illustrates those educational costs for fiscal years 1978-79, 1979-80, and the first six months of fiscal year 1980-81 (through 12/31/80).

<u>Object of Expenditure</u>	<u>Fiscal Year</u>		
	<u>1978-79</u>	<u>1979-80</u>	<u>6 Mo. 1980-81</u>
Educational Supplies & Materials		\$ 254	
Photo & Reproduction Supplies		42	
Books		1,975	\$ 710
Film Rental		13	
Tuition	\$7,450	10,675	5,160
Total Expenses	<u>\$7,450</u>	<u>\$12,959</u>	<u>\$5,870</u>

In addition to the postsecondary education cost above, the prison also pays for vocational education costs of prisoners. The General Fund appropriation is the funding source for vocational education. The prison does not classify vocational education as either secondary or postsecondary level. However, a portion of these costs are for vocational education programs similar in nature to those found at the five postsecondary vocational-technical centers in Montana. The following schedule illustrates vocational education costs of the prison.

	<u>Fiscal Year</u>		
	<u>1978-79</u>	<u>1979-80</u>	<u>6 Mo. 1980-81</u>
Personal Services	\$104,883	\$100,688	\$45,974
Operating Expenses	2,883	2,801	2,442
Total Expenses	<u>\$107,766</u>	<u>\$103,489</u>	<u>\$48,416</u>

The postsecondary education costs noted above are for those inmates enrolled in the extension program at the prison offered by the University of Montana. This is a 98 credit hour program for an associate of arts degree in sociology. The following schedule illustrates the enrollment by quarter for those inmates whose tuition was paid by the prison.

<u>Quarter</u>	<u>FY 79</u>	<u>FY 80</u>	<u>FY 81</u>
Summer	25	0	0
Fall	28	49	32
Winter	43	34	33
Spring	0	24	Not Available

These figures do not include inmates whose tuition was paid under veterans benefits or those Montana veterans who receive tuition waivers by law. Therefore, total enrollment is larger.

The prison does not pay any educational expenses for those persons who are in parole, probationary, or furlough status. These persons, who meet the eligibility requirements, may receive benefits for postsecondary education through various programs available to the general public. These programs include: 1) veterans benefits; 2) federal student aid programs (Basic Educational Opportunity Grants, College Work Study, National Direct Student Loans, etc.); 3) vocational rehabilitation; and 4) private scholarships or loan programs.

The prison has never paid any educational expense under provisions of section 46-23-415, MCA. This section provides in part: "(3) If no other sources of support are available, the costs of a prisoner under furlough who is in training or school shall be the responsibility of the state." One inmate filed suit attempting to recover education costs from the prison under this section. However, the court dismissed the motion against the prison on the grounds the plaintiff had not sought aid from other programs available to the general public.

#### Mountain View and Pine Hills

Section 53-30-213, MCA, provides for postsecondary education aid to residents of Mountain View and Pine Hills. This section states:

53-30-213. University aid to residents of schools. The department of institutions may on the recommendation of the superintendent authorize a resident of the Mountain View school or Pine Hills school who has completed high school and who is otherwise eligible to receive up to \$800 per year toward his expenses incurred in attending a unit of the Montana university system. The money may be used for transportation, clothing, books, board, and room and shall be paid in the same manner as other expenses of the school. The Montana university system shall not charge any fees or tuition for these residents. No more

than eight residents of each school may receive these benefits each year. The department shall notify the board of regents before August 1 of each year of the residents it has designated to receive the benefits for the forthcoming school year.

The following schedule illustrates the number of students attending the Montana university system under section 53-30-213, MCA.

<u>Fiscal Year</u>	<u>Average Number<sup>1</sup> of Students</u>
1977-78	4.10
1978-79	9.97
1979-80	2.53
1980-81	3.5 to 4*

<sup>1</sup> Fractional students due to drop-outs

\*Estimated

Department of Institutions officials explained that the department expenses under section 53-30-213, MCA, were \$6,110 for fiscal 1979 and \$3,576 for fiscal 1980.

The Department of Institutions also pays the tuition for students in the Aftercare Program. Aftercare is the equivalent of parole for juvenile offenders at Mountain View and Pine Hills. The department has an agreement with the University System Board of Regents and Office of Public Instruction, whereby 60 percent of the tuition for students in Aftercare is waived. The Department of Institutions pays the remaining 40 percent tuition for the students enrolled in the University System or one of the postsecondary vocational-technical centers. Total tuition expenses paid by the Department of Institutions under this agreement was \$2,363 for fiscal year 1979 and \$1,849 for fiscal 1980.

JM/jbb

Amendments to HB 298

1. Page 1, lines 11 and 12.  
Strike: "trustees of each elementary school district"  
Insert: "county superintendent of schools of each county"
2. Page 1, line 16.  
Strike: "trustees"  
Insert: "county superintendent"
3. Page 3, line 21.  
Following: line 20  
Strike: "supplied by the county superintendent and"
4. Page 3, line 23.  
Strike: "district"  
Insert: "county superintendent"
5. Page 3, line 24.  
Following: "submit"  
Strike: "its"  
Insert: "the"
6. Page 4, line 12.  
Following: line 11  
Strike: "receives"  
Insert: "completes"  
Following: line 12  
Strike: "from a district as prescribed by [section 7]"  
Following: "shall"  
Strike: ":"  
Following: line 13  
Strike: "(a)"
7. Page 4, line 16.  
Following: line 15  
Strike: "(i)"  
Insert: "(a)"  
Renumber: subsequent subsections accordingly
8. Page 4, line 25.  
Following: line 24  
Strike: subsection (b) in its entirety
9. Page 5, line 5.  
Strike: subsection (1) in its entirety  
Renumber: all subsequent subsections
10. Page 5, line 18.  
Strike: section 8 in its entirety

## SPECIAL REPORT: CONTINUING PARTICIPATION IN SOCIAL SECURITY

*The following report is reprinted from the October, 1976 issue of College and University Business Officer, the newsletter of the National Association of College and University Business Officers (NACUBO). It was written by William T. Slater, vice president, and Thomas J. Cook, research assistant, of Teachers Insurance and Annuity Association (TIAA) and its companion organization, College Retirement Equities Fund (CREF). TIAA-CREF are nonprofit service organizations that provide retirement and insurance benefit plans for colleges, universities, independent schools, and related educational and scientific institutions.*

Unlike nearly all other American employers, private, nonprofit organizations and units of state and local government enter the social security Old Age, Survivors, Disability and Hospital Insurance benefits program (OASDHI) on a voluntary basis. Once entered, they have the option of dropping out after a minimum period of participation (five years for public employers and eight for private nonprofit organizations) and a two-year waiting period preceded by a notice of intent to withdraw.

Nonprofit and state and local employers were originally exempted from participation because of questions of whether the federal government could legally tax such employers. Since voluntary participation became possible, in the early 1950s, 90% of the employees of nonprofit organizations (roughly 3.6 out of 4 million) and 70% of the employees of state and local governments (some 8.4 out of approximately 12 million) have become covered. About one-half of one percent of these covered employees have had their participation terminated.<sup>1</sup>

Recently, social security tax increases and widespread publicity about decreases in the trust funds have stimulated interest in the withdrawal option. Although we do not know of any educational institutions that have dropped out, budget-conscious administrators on college campuses are beginning to show some interest in considering the feasibility of this option. The purpose of this article is to review some of the pitfalls and risks for both employers and employees in dropping out of social security.

### Financial Stability of Social Security

Charges that social security benefit payments will soon be in jeopardy stem in part from confusing the operations of the trust funds in the financing of old-age benefits with the financing of benefits under pension plans.<sup>2</sup> Social security is a "pay-as-you-go" income transfer system, not a funded system: today's workers support the current retired generation with their tax contributions, with the expectation that their turn to receive benefits will come and that taxes will be collected from future workers to provide the benefits stipulated by law at that time. In addition, social security benefits incorporate "social criteria" through weighting benefits in favor of lower-paid workers and providing much higher benefits for workers with eligible dependents than for those without, although all employed workers pay at the same tax rate.

The social security system does not require a large reserve fund because it operates as a national system that assumes a continuing and sufficient flow of new entrants. There was never any intention that the trust funds should accumulate reserves comparable to the actuarial reserves of pension programs. The trust funds accumulate from money derived each year from an excess of receipts over disbursements and ad-

ministrative expenses, with the bulk of annual payroll taxes disbursed currently as benefit payments. The trust funds act as a buffer that is available to absorb the initial added expenses of benefit increases and to compensate for decreases in social security tax receipts during periods of high unemployment.

The system is, however, currently confronted by two problems, one short range and one long range.

**Short-Range.** As a result of recent economic conditions (a high rate of inflation, a high level of unemployment, increased disability claims, and recent benefit increases) current receipts could, if no action were taken by Congress, soon fall below current benefit payments and expenses by amounts greater than the trust funds could cover. This financing problem can be corrected with a small increase in the employer-employee tax rate, or, as has been proposed, by applying the present hospital insurance tax (Medicare, Part A) to support the old-age benefits and using general revenues to finance the hospital

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***TIAA believes that an institution giving careful consideration to the economic security of both present and future employees, to its needs in recruiting and retaining staff, and to the limits of its own financial resources, will recognize the considerable value of social security as a base for its staff benefits program.***

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insurance benefits. Past congressional actions have maintained the buffer function of the trust funds, and there is no reason to doubt that this will continue.

**Long-Range.** The 1972 Amendments introduced, apparently unintentionally, a double application of the cost-of-living increase. This resulted in a sharp rise in projected future costs and an accompanying change in the traditional ratio of the old-age benefit to final average salary that within a few decades could produce old-age benefits higher than preretirement earnings levels. It also seems likely that Congress will act within the next few years to rectify the longer-range financing problem. A correction, generally referred to as "decoupling," would reduce projected long-range costs and restore initial benefit amounts for future newly retired beneficiaries to about the traditional percentages of final average salary.

In summary then, social security is not going broke, since Congress can be expected to pass legislation to deal with the financial problems. This brings us to the many other matters that should be considered by any institution studying the question of dropping out. For example, are there provisions and features of social security that cannot be duplicated? Would employers and employees be helped or harmed by withdrawal? Could they get a better buy through private insurance? These and other points are discussed below.

### ***Tax-Free Benefits***

One valuable feature of the social security program often overlooked is the fact that benefits are received tax-free. There is a considerable dollar value to this "hidden" part of the benefits. Any attempt to replace or equal the old-age benefit, such as with annuity contracts or a state retirement system, would have to aim at providing an *after-tax* benefit equal to the social security benefit.

### ***Cost-of-Living Benefit***

Another important feature of social security, rarely found in pension plans, is the cost-of-living escalator, added to the program by the 1972 Amendments.<sup>3</sup> In the few pension plans that have escalators, there is usually a ceiling on annual benefit increases, such as 3% or 4%. It should be emphasized that the social security cost-of-living provision is open-ended, without a benefit ceiling. So far, it has produced benefit increases of 8% in 1975 and 6.4% in 1976.

Any cost-of-living escalator for retirement benefits is expensive. A rough rule of thumb is that for each 1% of annual escalator guaranteed to retirees for life, about 10% is added to the total cost of a pension plan. For example, the total cost of a pension plan is increased by about 40% if the plan is to increase benefits by 4% each year in retirement, 50% if the increase is to be 5% a year, etc.

### ***Who Pays for Social Security?***

There is a real possibility that dropping out would have the ironic effect of excluding employees from the benefits of a program they might nevertheless be supporting in the future through their federal income taxes. The 1975 Social Security Advisory Council recommended that hospitalization (Medicare, Part A) benefits be paid for out of general revenue

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***Under present law, once coverage has been terminated for a non-profit or public employer, the employer cannot again provide social security coverage for its employees . . . even if re-entry is desired by future administrators and by every one of its employees.***

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funds. Voluntary Medicare (Part B), which covers physicians' and other services not included in Part A, is already financed by "premiums" from enrollees with matching contributions from the federal government. Every year Congress considers bills that propose use of general revenues to support social security benefit payments, and there are increasing indications that Congress may prefer such support to further increases in employer and employee contributions.

With or without general revenue support, there is the point made by some that wage taxes (such as social security taxes) are actually borne by consumers. To the extent that the employer's cost of social security is passed through to consumers along with other labor costs, this results in consumers paying for social security, through the prices of goods and services, whether they are covered by the program or not.

### ***No Re-entry***

Under present law, once coverage has been terminated for a nonprofit or public employer, the employer cannot again provide social security coverage for its employees. If a college, university or school drops out, there can be no re-entry for it under present law, even if re-entry is desired by future administrators and by every one of its employees. This rule is particularly important in light of the possible use of general revenue financing and the potential for future increases in the scope of benefits under Social Security.

### ***An Expected Benefit***

Employers who drop out may face difficulties in hiring new employees under conditions that do not include social security as part of their benefit program. A potential new employee considering two or more otherwise similar offers of employment might well hesitate to join an employer who was permanently out. No employee knows for sure how long he or she

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***There is a real possibility that dropping out would have the ironic effect of excluding employees from the benefits of a program they might nevertheless be supporting in the future through their federal income taxes.***

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will stay, and absence of social security coverage could mean a considerable sacrifice of personal and family security.

Present employees, even those who are "fully insured," have much to lose from dropping out. A fully insured status (ten or more years of covered employment) entitles the worker to *some* benefits, but not to full benefits if there are substantial gaps in coverage.<sup>4</sup> The benefits formula is based on average *covered* wages earned over an entire working lifetime. Years of noncoverage are counted in the formula as years of zero earnings, thus lowering the average. Also, Robert J. Myers, former chief actuary of the social security system, has aptly noted: "It is not generally understood that employees who are nearing retirement age when coverage is dropped will suffer a reduction in their social security benefits because of lack of coverage during those few, final years before retirement, which would be far greater in actuarial value than taxes they might save by dropping out of the System."<sup>5</sup>

Since the amount of social security survivors' benefits is also based on average covered wages, for persons already fully insured, years of noncoverage reduce their survivors' income protection as well as their own future social security retirement income. Employees not yet fully insured—generally younger staff members with the greatest need for family protection—would not be eligible for *any* survivor benefits within two years of the date their participation was terminated.

Dropping out would also mean that employees, present and future, who had already met the eligibility requirements for social security disability income would lose this coverage entirely in five years from the time their participation terminated. Once lost, eligibility for the disability benefits could not be regained by employees who shifted jobs to other employers until they had again participated for a continuous five-year period.



## OASDHI BENEFITS

*The Social Security Old-Age, Survivors', Disability, and Hospital Insurance Benefits in brief:*

**Old-Age benefits**—payable to a retired worker and to a worker's wife or dependent husband. A person now retiring at age 65 can receive a maximum annual tax-free social security retirement benefit of about \$4,700, or \$7,000 a year if eligible for a couple's benefit, assuming an earnings history at or above the OASDHI earnings base. Future maximum benefits will be even higher as the CPI escalator and average covered earnings increase.

**Survivors' benefits**—in case of the worker's death, income for spouses with eligible children in their care, for eligible children; and for elderly widows. For a widow or widower with two young children the survivors benefits can be the equivalent of as much as \$150,000 of life insurance.

**Disability benefits**—income for a disabled worker under age 65, with added amounts for eligible spouse and children. For a young eligible employee who becomes totally disabled these disability benefits can be as much as \$6,000 a year, or as much as \$11,000 a year if the employee has a spouse and two children, not including the automatic benefit increases related to inflation; and all of the benefit is tax free.

**Hospital insurance**—in old age and for disabled workers. Everyone who is fully insured for old-age social security benefits at age 65 is automatically entitled to the hospital insurance of Medicare, Part A, without further charge, since it is financed through a portion of the regular employer-employee social security tax. Persons not eligible for the hospital insurance coverage beginning at age 65 can then purchase it at whatever the current premium level happens to be. The premium for such coverage has increased by 36% since 1973, from \$33 to \$45 a month.

### Can You Duplicate Social Security?

It is sometimes argued that covered employees—particularly younger people—would do better financially if their money were placed in a pension plan, an annuity contract or personal investments rather than social security. Actually, it is impossible to compare the costs of social security with pension or insurance plans. As pointed out earlier, there is really no way to compare a social program of income transfers with an actuarially sound insurance or annuity plan. There are basic differences that arise from the social concepts of social security: its weighting in favor of lower incomes, its non-taxability of benefits, its open-ended cost-of-living escalator, and of course the varied array of social security benefits themselves.

A major part of the problem of trying to duplicate or estimate the cost of social security benefits is that the program

has experienced many dramatic changes over the years and is likely to continue being changed. Survivors' benefits were not part of the original legislation: disability benefits were added in 1954 and extended further in 1958, and Medicare was added in 1965; average monthly payments to retired workers increased 137% between 1964 and 1974. No one can say what future changes will be made—perhaps the addition of national health insurance for persons of all ages—but it is certain that any attempt to hypothesize a set of benefit substitutes today would result in a static model without applicability to future changes.

Although side-by-side comparisons are out of the question, we have developed some cost estimates in the hope that figures which reflect the cost of pension benefits approximating no more than the system provides as presently structured would be helpful as a general guide. It is estimated, based on an inflation rate of 3% a year, that to purchase an annuity to replace just the old-age portion of the social security benefit for an unmarried, 30 year old male would require a yearly outlay of about 18% of covered earnings from age 30 to age 65.<sup>6</sup>

The cost of buying the 30-year-old an annuity to equal the couple's benefit at age 65 jumps to roughly 31% of salary. [The total OASDHI tax rate (employer plus employee) is presently 11.7% of covered earnings.] Older employees who

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***Employers who drop out may face difficulties in hiring new employees under conditions that do not include social security as part of their benefit plan.***

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dropped out with fully insured status would receive some benefit from social security when they reached age 65. The costs for replacing the lost portion of the benefit are less for them than for the 30-year-old, but are nevertheless substantial.

For an unmarried, fully insured male who drops out at age 40, providing the lost portion of the primary insurance amount (PIA) at age 65 would require about 13% of covered salary or 22% of covered salary for the couple's benefit. Percentages for 50- and 60-year-old drop-outs would be higher than for the 40 year old employee because of the shorter time remaining to retirement for the funds to earn interest. Attempting to replace survivors', disability, and hospital insurance would be an additional expense.

These estimated replacement costs would of course be in addition to the contribution rates of the employer's existing pension plan. Since most institutions with TIAA-CREF retirement plans are already contributing a combined employer-employee rate of at least 10% of salary toward pension benefits, adding the cost of substitute social security benefits would be prohibitive. Moreover, under ERISA rules the maximum amount that may be contributed to an employee's "defined contribution" annuity contract within any one year without being taxable as current income to the employee is, generally, the lesser of 25% of salary or the maximum exclusion allowance under the previous law (the old 20% rule), including annuity contributions under the regular plan.

The limitation on tax-deferral is not the only ERISA problem involved in establishing a pension or insurance plan to replace social security benefits. ERISA imposes strict requirements for reporting and disclosure of plan provisions as well as requirements governing participation, vesting, benefit accrual, funding, and fiduciary responsibility. Separate welfare plans providing disability, survivor, and medical benefits also must meet prescribed reporting, disclosure and fiduciary requirements under ERISA. Attempts to replace social security with other programs would subject employers (presently only private institutions) to all of these regulations for benefits not now covered by ERISA. By contrast, the employer faces none of them under social security.

In addition to limits imposed by ERISA, employers could expect to run up against other restrictions in attempting substitutes. As noted elsewhere, the life insurance value of social security survivor benefits is high, reaching as much as \$150,000 under present law. Attempting to provide these benefits by group life insurance may pose a legal problem. In many states, insurance laws limit the amount of group life insurance that can be provided by an employer, often to two or two-and-one-half times salary, or to a specific dollar amount well below the value of the social security survivor benefits. Some employers would therefore find that these survivor benefits simply cannot legally be replaced through group life insurance. Also, the Internal Revenue Code specifies that whenever more than \$50,000 of group life insurance is provided an individual, the premium for insurance above that amount must be included as taxable income to the employee.

### Congressional Action

The possibility of Congressional action to further discourage or prohibit OASDHI withdrawals cannot be overlooked. The Social Security Administration has estimated that just for the employees of New York City there would be a \$3.1 billion

loss in contributions and interest to the trust funds during the period of 1978 through 1982 if their coverage is terminated in March 1978.<sup>7</sup> The concept of a national income transfer system such as social security assumes universal participation across society and across generations. There is some question of the propriety of public or private educational institutions opting out of a national program on the strength of a special concession that originated a quarter of a century ago because of their historical exemption from federal taxes.

The commissioner of the Social Security Administration has stated that consideration of increased withdrawals may well lead to a re-examination of the public policy on which the present coverage provisions are based. "We are very much concerned," he has observed, "about the effects that these terminations have on the benefit protection of workers whose coverage is terminated and on the financial and programmatic integrity of the Social Security trust funds."<sup>8</sup>

To prevent crippling losses of revenues, it is likely that Congress will consider proposals that coverage be made compulsory for all employees, including currently exempt government employees. The 1975 Advisory Council on Social Security recommended that Congress immediately begin developing ways of making the system applicable to virtually all gainful employment. Of course this and other proposals being made will face opposition, but the point to bear in mind is that Congressional committees are already seriously considering all aspects of the withdrawal process and its implications for the future of social security.

TIAA believes that an institution giving careful consideration to the economic security of both present and future employees, to its needs in recruiting and retaining staff, and to the limits of its own financial resources, will recognize the considerable value of social security as a base for its staff benefits program.

1. U.S. Congress, House, *Background Material on Social Security Coverage of Governmental Employees and Employees of Nonprofit Organizations*, Subcommittee on Social Security, 94th Congress, Second Session (April 26, 1976), pp. 3, 22.

2. There are three trust funds—for old-age and survivors' insurance, disability insurance, and hospital insurance—which are respectively financed by tax rates of 4.375%, 0.575% and 0.9% to make up the total 5.85% rate levied on both employees and employers.

3. The monthly benefit is increased in June of any year in which the Department of Labor's Consumer Price Index shows an increase of 3% or more as measured from the first quarter of the preceding year or since any other quarter of the previous year for which Congress legislated a benefit increase to the first quarter of the year in question.

4. To be "fully insured" a person must have at least one quarter of coverage for each calendar year (4 quarters) elapsing after 1950, or if later, after the year in which he attained age 21. A person who has 40 quarters of coverage is fully insured for life. To be "currently insured" a person must have at least 6 quarters of coverage during the full 13-quarter period ending with the calendar quarter in which he died, most recently became entitled to disability benefits, or became entitled to retirement benefits.

5. *Employee Benefit Plan Review*, (June 1976), p. 62.

6. Cost estimates are based on the following assumptions:

Initial Salary:	\$15,300 per year
Future Salary Increases:	5% per year to age 65
Future Wage Base Increases:	5% per year
Future CPI Increases:	3% per year
Interest Rate:	6% per year
Mortality Table:	A-74 mortality tables set back 1.0 years for males and 2.5 years for females

Cost of the old-age replacement benefit (PIA) for single employees and for married employees whose spouses qualify for benefits in their own right will vary resulting from the requirement of different tax tables for married and single persons in calculating the tax free benefit and the differences in male and female longevity. In examples given in the text, the calculations assume current tax tables are applied in future years and a private pension plan income equal to the PIA is received. Cost of the old-age couple's replacement benefit includes the PIA plus 50% assuming the presence of a wife/dependent husband qualifying for the spouse's benefit at age 65.

The 30-year-old employee is not assumed to have achieved fully insured status; for the 40-, 50-, and 60-year-old employees, coverage is assumed since the later of 1950 or attainment of age 21.

7. U.S. Congress, House, *Background Material on Social Security Coverage*, p. 5.

8. Statement of James B. Cardwell, Commissioner, Social Security Administration, before the Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives, Monday, April 26, 1976, pp. 1-3, (mimeographed).

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## WITHDRAWALS FROM SOCIAL SECURITY COVERAGE

Only the governmental entity can formally initiate action to terminate Social Security coverage. The employee has no legal control over the state's action nor does the state or any of its political subdivisions have to notify employees of any action to withdraw. The only stipulations that the state or political subdivision must meet are as follows:

- The unit must have been covered under the program for at least five years.
- After the formal announcement to terminate is made, a two-year waiting period is necessary before termination becomes effective.
- Once the governmental unit withdraws, it may not reenter the program.

Until 1972, most withdrawals were initiated by employee groups in small governmental units. However, the recent trend is for the governmental unit to initiate the withdrawal irrespective of employee desires or needs. One motivating drive behind this activity by state and local employers is the desire to ease financial deficits. When a governmental unit terminates coverage, substantial money is saved and the pressures of finding new tax dollars are temporarily eased.

While such maneuvering may seem to offer savings, employees cannot passively stand by while a major portion of their fringe benefits package goes down the drain. In fact, if a governmental unit opts out of coverage, with or without the employees' sanction, benefit coverage similar to that available under Social Security is certain to be negotiated with employers, probably at a substantial increase in cost.

Few terminations of coverage occurred during the 1950's and 1960's, and until 1975 the number of state and local employees brought under coverage each year always exceeded terminations. In that year, however, the number of positions newly covered exceeded the number of positions terminated by only 1,905. By December 1977, coverage was terminated by another 210 entities employing about 75,000 workers.

California leads in the number of terminations. In that state the Social Security coverage of 24,500 public employees (not including teachers) had been terminated as of December 1975 and the termination of the coverage of an additional 33,600 employees is pending.

No state has yet terminated the coverage of all state employees, but Alaska has notified HEW of its intent to do so effective December 31, 1979. To date, terminations of coverage have affected more teachers in Texas than in any other state.

### Motivation Behind Termination

In 1965, total employer-employee costs were \$403.20 per year; and the benefits, compared to those of private plans, were considered excellent. In 1979 the total employer-employee contribution for an employee earning \$15,300 was \$1,875.78, and the amounts are projected to increase in the future. With inflation and the proportion of retired persons rising in relation to the number of workers paying into the pool, costs are projected to escalate. New revenue may need to be generated by placing a lid on benefits, paying part of the cost out of general tax revenues, or using any other method. If no additional revenue is found, costs will climb steadily at least until the year 2050.

When a state terminated Social Security coverage in past years, it was often because of public employee pressure. Individuals who desire to terminate their coverage are usually those who have been covered long enough under the program to meet the earnings requirements for Social Security benefits and who are, therefore, eligible for benefits without paying further contributions. It seems to be to their financial advantage to withdraw from Social Security and purchase other protection with the money that would otherwise be paid into the Social Security program.

Other employees wish to withdraw from Social Security because they have liberal staff retirement protection and expect to qualify for Social Security benefits on the basis of credits earned in secondary jobs or in covered work performed after retirement from state or local employment.

More recently, however, severe financial difficulties have led state and local entities to consider termination of coverage as a way of reducing government costs.

### **The Law Governing Withdrawals**

Before the 1950 amendments to the Social Security Act, employment by a state or its political subdivisions was not subject to coverage under Social Security. However, the Act, which became law on August 28, 1950 (P.L. 734), made such service eligible for coverage in accordance with the provisions of a new Section 218.

Since the original enactment of Section 218 under the 1950 amendments, subsection (g) of Section 218 has remained unchanged, as follows:

#### *Termination of Agreement*

(g) (1) Upon giving at least two years' advance notice in writing to the Administrator, a State may terminate, effective at the end of a calendar quarter specified in the notice, its agreement with the Administrator either--

(A) in its entirety, but only if the agreement has been in effect from its effective date for not less than five years prior to the receipt of such notice; or--

(B) with respect to any coverage group designated by the State, but only if the agreement has been in effect with respect to such coverage group for not less than five years prior to the receipt of such notice.

(2) If the Administrator, after reasonable notice and opportunity for hearing to a State with whom he has entered into an agreement pursuant to this section, finds that the State has filed or is no longer legally able to comply substantially with any provision of such agreement or of this section, he shall notify such State that the agreement will be terminated in its entirety, or with respect to any one or more coverage groups designated by him, at such time, not later than two years from the date of such notice, as he deems appropriate, unless prior to such time he finds that there no longer is any such failure or that the cause for such legal inability has been removed.

(3) If any agreement entered into under this section is terminated in its entirety, the Administrator and the State may not again enter into an agreement pursuant to this section. If any such agreement is terminated with respect to any coverage group, the Administrator and the State may not thereafter modify such agreement so as to again make the agreement applicable with respect to such coverage group.

## Congress Looks at the Problem

Late in April 1976 Congressional hearings were held in Washington, DC, where representatives of units of state and local government and their union representatives argued for and against making coverage under Social Security mandatory.

The hearings were held by the Subcommittee on Social Security of the Committee on Ways and Means in the U.S. House of Representatives, and it appears almost certain that some type of legislation directed at solving the problem of coverage in the public sector will be forthcoming.

*Compulsory coverage.* The 1975 Advisory Council on Social Security urged that all employment not covered under Social Security, including state and local employment, be mandated under Social Security. However, the states are generally opposed to this not only because of cost considerations but also because many employers whose employees are not now covered under Social Security would have to modify their staff retirement systems to take the additional cost of Social Security coverage into account. In addition, an unresolved constitutional question exists as to whether the federal government can levy a Social Security tax on employment by states and their political subdivisions.

*Coverage of employees under the self-employment provisions.* Under this alternative all employees not covered under Social Security would be compulsorily covered under the self-employment provisions of Social Security. (Precedents for the treatment of employees as self-employed persons do exist.) This alternative would eliminate the problems of windfalls and gaps in protection and would probably discourage employees from seeking termination of coverage since Social Security self-employment contributions are higher than employee contributions.

One problem, however, is that Social Security trust funds would suffer since the self-employment contribution rate is only 68 percent of the combined employer-employee contribution rate. This approach also would encourage employers to terminate coverage since they would not have to contribute Social Security funds. In addition, states would have no incentive to extend coverage to additional employee groups.

Still another problem is that employees would probably object to their contribution costs. Most employees not now covered by Social Security are covered under and pay contributions to a state or local retirement system. Adding Social Security coverage would require the employees to make substantial total contributions. Further, the combined benefits payable under the two programs might be higher than an employee's former salary.

*Offset of Social Security benefits.* Another alternative would be to reduce the Social Security benefit payable to a person who was also entitled to a staff retirement pension based on employment not covered under Social Security. This would solve the problem of windfall benefits. Unfortunately, it has proved virtually impossible to find an offset method that would produce equitable results and would not involve insurmountable administrative difficulties.

## Ways To Discourage Termination

*Repeal termination provisions.* Section 218(g)(1)—reprinted in the preceding section—might be repealed, so that under the law no current agreement could be terminated and future coverage agreements would be permanent. Of course, whether this provision could be altered unilaterally is also a question. Alternatively, all coverage agreements could be terminated, and the states could negotiate new agreements that would not include a right to terminate coverage for employees.

All things considered, any legislation to foreclose termination would probably accelerate rather than inhibit termination of coverage.

*Freeze employee benefits.* If benefits were frozen at the time of termination, employees would not enjoy the future advantages of general benefit increases or liberalization in protection. However, seriously impairing the protection of many employees would run counter to the basic philosophy of Social Security—that of preventing dependency. This approach also presents serious administrative difficulties.

*Legislate more restrictive termination conditions.* The conditions for termination could be made more restrictive by legislation rather than by renegotiation of the state coverage agreements. For example, a referendum in which a majority of employees had to vote for termination of coverage could be required before the state entity could terminate coverage. Or, an independent actuary might be required to certify that the total protection (from all sources) provided for the group would not be impaired because of termination.

The major problem here might be the issue of whether the provision altered the terms of the state's coverage agreement without the state's consent.

*Withhold from federal grants to the states excess costs to the Social Security trust funds.* The amount of the windfall benefits paid to employees for whom coverage was terminated could be withheld from federal grants or other federal revenues given to the state. (Social Security benefits paid to the workers involved would not be affected.)

Withholding federal monies, however, would deprive some individuals of needed aid from social welfare programs. Incentives for employees to seek termination would not be reduced, and the states would only be partially deterred from seeking termination for financial reasons.

In addition, an accurate estimate of the amount of the windfall would be difficult to obtain, and strong disagreement would probably exist on the proper amount of adjustment.

\* \* \* \* \*

The preceding arguments on ways to discourage termination or otherwise address the problem of withdrawals have been excerpted from a document prepared by the Subcommittee on Social Security. The National Education Association has not at this time officially supported any federal solutions and presents the preceding for information purposes only.

## ARGUMENTS FOR AND AGAINST SOCIAL SECURITY COVERAGE

Social Security coverage is complex, and weighing the advantages and disadvantages of the program is not a clear-cut, either-or situation. Valid comparisons of Social Security and other retirement plans or insurance policies are difficult to make because the program can be changed at Congressional will by federal legislation.

Most comparisons overemphasize the financial advantages of termination. Withdrawing from the system and signing up with another plan may only save money temporarily, because it is likely that the private carriers would eventually raise their costs. Also, interest rates fluctuate and could adversely affect other investments made with "Social Security" money.

Nonetheless, making comparisons based on what the Social Security system is today, the consensus of retirement experts is as follows:

- If teachers are currently covered, the coverage should be maintained. The benefits provided—especially Medicare—would be nearly impossible to duplicate at the same low price.
- If teachers are not covered, their supplemental benefits package should include programs partially resembling those of Social Security. When a group decides to seek coverage, the effect the Social Security benefits would have on present benefits of the state or local retirement system must be analyzed carefully.

Although the following list is not exhaustive or overly detailed, it should provide a base from which an education association can analyze its own particular situation. Appendices B and C will also be helpful. Keep in mind that nearly every advantage can be turned into a disadvantage and vice-versa, depending on your viewpoint.

### Arguments for Social Security Coverage

- Since coverage is almost universal, it provides security against the loss of credits through mobility. This portability of benefits is not presently possible among teacher retirement systems.
- The programs of Social Security cannot be offered by private carriers at a similar price.
- The retired worker benefit plus a spouse's benefit exceed the average benefit payable from retirement systems to which teachers belong.
- Medicare benefit equivalents generally are not available to teachers.
- General revenue funds may be used to finance Social Security. If this happens, all teachers would be helping to finance the system, whether or not they receive benefits.
- Social Security benefits represent a national standard for all workers.
- Extended Social Security coverage would decrease welfare and old-age assistance costs, although this might not be true in the majority of teacher cases.

- Low-income and young workers receive survivor and disability benefits that substantially exceed their level of contributions and wages.
- Survivor benefits for widows and children are excellent.
- Benefits are exempt from taxes.
- Many retirement systems to which teachers belong do not provide adequate benefits. Social Security can supplement these benefits and raise them to acceptable levels.
- Social Security could become the vehicle for a national health insurance program.
- The federal government may assume a large portion of the costs of Social Security. Money from state sources could be freed for other uses.
- Retired worker benefits are adjusted upward as the cost of living increases.
- "Spouses' offset" due to a noncovered government pension would not apply if Social Security coverage were maintained.

#### Arguments for Not Having Social Security Coverage

- The governmental unit has the unilateral authority to withdraw from coverage. Employees have no official opportunity to protest the employer's termination of coverage.
- Employees may be able to get the same benefits at a lower cost, or higher benefits for the same cost.
- Social Security payroll taxation is continuously rising. There is a limit to what both employees and employers can pay to Social Security and yet still participate in a separate state or local teacher retirement system. Thus, in the long run Social Security taxes may force legislatures to reduce benefits from the retirement system.
- Many Social Security benefits are sexually discriminatory, particularly in respect to survivors of women teachers.
- Upon reaching age 62 or 65 many married women teachers become eligible for one-half of a covered husband's benefit. Thus, through separate employment, a working woman pays the same tax for one-half of the benefit. (However, the spouse's benefit will be offset by public pension benefits for those retiring after 1982.)
- Social Security taxes are nonrefundable when the worker leaves covered employment.
- Many teachers are covered under Social Security because of their nonteaching employment.
- Social Security benefits may be reduced at any time by an act of Congress.





OFFICE OF PUBLIC INSTRUCTION

STATE CAPITOL  
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Ed Argenbright  
Superintendent

January 28, 1981

To: Members of the House Education Committee  
From: *Judy Johnson*  
Judith A. Johnson, Director Special Education Unit  
Re: House Bill 333

"A bill for an act entitled: "An act to define the terms least restrictive, less restrictive and appropriate public education" as they relate to the laws governing the habilitation of handicapped persons in the State of Montana; amending Sections 20-7-401, 53-20-102 and 53-21-102, MCA."

The Office of Public Instruction would like to address the education committee specifically on Section 20-7-401 although we feel supportive in having the statutes in 53-20-102 and 53-21-102 MCA coincide with definitions found in 20-7-401.

The new section page 1, line 15-18 (1) "Appropriate public education" definition is <sup>paraphrased</sup> taken from Section 504 of the Rehabilitation Act of 1973. The comments in Subpart D- preschool, elementary and secondary education #23. "Section 84.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met."

The committee may wish to amend the language to be consistent with 504 to avoid any misinterpretation.

Concerning the new definition of "least restrictive" and "less restrictive" on page 3, line 17-21, the education committee should be informed that there is

no mention in the 504 regulations of least restrictive nor have the federal offices dealing with PL 94-142 attempted to define least restrictive.

The principle of least restrictive placement rests on the policy of individualized or appropriate education. This principle is a technique for achieving individually appropriate education and should be viewed in that context. What is restrictive or inappropriate for one person may not be restrictive or inappropriate for another.

These required procedures are found in PL 94-142.

"To the maximum extent possible, handicapped children should be educated with children who are not handicapped.

Removal of a handicapped child from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children.

The handicapped child's placement is determined at least annually and is based on an individualized education program.

The placement is as close to the child's home as possible.

Unless the handicapped child's individualized education program requires some other arrangements, the child is educated in the school he or she would attend if not handicapped.

In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

Where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment.

To the maximum extent possible, a handicapped child should participate with nonhandicapped children in nonacademic and extracurricular services and activities."

The Office of Public Instruction supports the concept of least restrictive environment as has the State of Montana in their commitment to special education services. We feel the legislature has taken measures to ensure that each child who has special education needs is provided with the opportunity to receive appropriate services at public expense suited to those individual needs. We also feel the education committee recognizes the necessity for a flexible program of special education and for the frequent reevaluation of needs.

Because of this need for flexibility in programming for each unique child, we would ask for an amendment to line 20, page 3.

This amended sentence should read:

"The terms do not refer only to the location of services but to the actual restrictions placed on the individual."

The minor change would give all those involved the continued flexibility needed to assure that the needs of the handicapped are being met.

We thank the committee for their time and consideration in this matter and appreciate your support of handicapped individuals.

**WEDNESDAY, MAY 4, 1977**

**PART IV**



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**DEPARTMENT OF  
HEALTH,  
EDUCATION, AND  
WELFARE**

**Office of the Secretary**



**NONDISCRIMINATION  
ON BASIS OF  
HANDICAP**

**Programs and Activities Receiving or  
Benefiting from Federal Financial  
Assistance**

staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with § 84.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The Secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but § 84.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See § 84.4(c)(2)(iv), prohibiting unnecessarily separate treatment; § 84.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new § 84.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment—that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 84.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 84.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "If construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is car-

ried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable, because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase "to the maximum extent feasible" has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

As proposed, § 84.23(c) required compliance with the American National Standards Institute (ANSI) standard on building accessibility as the minimum necessary for compliance with the accessibility requirement of §§ 84.23 (a) and (b). The reference to the ANSI standard created some ambiguity, since the standard itself provides for waivers where other methods are equally effective in providing accessibility to the facility. Moreover, the Secretary does not wish to discourage innovation in barrier-free construction by requiring absolute adherence to a rigid design standard. Accordingly, § 84.23 (c) has been revised to permit departures from particular requirements of the ANSI standard where the recipient can demonstrate that equivalent access to the facility is provided.

Section 84.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

#### SUBPART D—PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

Subpart D sets forth requirements for non-discrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§ 84.32 and 84.33 apply only to public programs and § 84.39 applies only to private programs; §§ 84.35 and 84.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D.Pa. 1972), and *Lebanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94-142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education,

(2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 84.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Former §§ 84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new § 84.33. Under § 84.34(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "In" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 84.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of non-handicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of § 84.34 and be suited to his or her educational needs.

TUESDAY, AUGUST 23, 1977

PART II



# DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

## EDUCATION OF HANDICAPPED CHILDREN

Implementation of Part B of  
the Education of the Handicapped Act

skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5) (C).)

*Comment.* Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

#### § 121a.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 121a.550-121a.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 121a.340-121a.349 of Subpart C.

(20 U.S.C. 1412(5) (C); 1414(a) (5).)

*Comment.* Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist, in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

#### § 121a.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with §§ 121a.340-121a.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 121a.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5) (c).)

#### LEAST RESTRICTIVE ENVIRONMENT

#### § 121a.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.550-121a.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. 1412(5) (B); 1414(a) (1) (C) (iv).)

#### § 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5) (B).)

#### § 121a.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 121a.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. 1412(5) (B).)

*Comment.* Section 121a.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84—Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: " \* \* \* it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs \* \* \*."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parent's right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

#### § 121a.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 121a.306 of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

(20 U.S.C. 1412(5) (B).)

*Comment.* Section 121a.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided

PROPONENT for HOUSE BILL NO. 333

I wish to support House Bill No. 333 on the grounds that it is a necessary law for several reasons:

The first part is a definition, or at least guidelines of definitions of what is meant by an appropriate education, it states "Appropriate public education" means an educational opportunity that is designed to meet the needs of the handicapped individual as adequately as the needs of the nonhandicapped individual are met.

Presently we have a state legislature being requested to fund appropriate special education for a cost of thirty-five to forty million dollars. School districts are now, by state law, mandated to provide appropriate special education and parents and concerned citizens of the State are demanding that the identified special education students receive this education. But as yet no state law even attempts to say what it is.

House Bill No. 333 by adopting a definition similar to what is used in federal law section 504 of the Rehabilitation Act of 1973, and similar to the explanation given in the Federal Register explaining 94-142 would enable the state legislatures who are being asked to fund it, the school districts who are to provide it, and the students who are to receive it, a common definition. It would enable the State Superintendent to establish the guidelines of how this was to be carried out.

I believe that the lack of state law in making any kind of definition has led many people to use the federal law as the basis of their programs. They then find themselves in court trying to prove that the federal law was the state legislatures intent. Hundred of thousands of dollars of Montana taxpayers money has already been spent in court, at least some of which could have been saved had House Bill No. 333 been state law. Without this law every school district that is providing less than what a parent or advocate thinks is an opportune education is subject to countless law suits.



Proponent for House Bill No. 333  
Page 2

The second change in House Bill No. 333 is to provide protection to the developmental disabled person who by both state and federal law must be considered for placement in a continuum of service options.

This definition simply states that in determining the least restrictive placement of an individual, what restrictions will be placed on the individual must be taken into consideration, not the over simplification that one placement setting is necessarily less restrictive than another setting.

I think the authors of this bill believe that state agencies are established to serve individual needs and they therefore wrote a definition of least restrictive that protects individuals from being used by agencies to carry out an ideology of those agencies at the expense of the individual.

I believe that most people working in the area of placement of persons are looking out for the individuals needs and rights. These people deserve the support of the state legislature to pass House Bill No. 333 so that if over zealous federal or state officials attempt to force placements that are not in the best interest of the individual they will have a state law to resist such placement until such time as the individual will be well served by the placement. I hope that the advocates of the developmental disabled review this law carefully, for I believe that if they do they will be its strongest supporters.

In closing I want to reiterate that in adopting the definitions of appropriate education you would guarantee at least equal educational opportunities to the developmental disabled and would in no way prohibit a school from providing more services if they so desired, any more than the present accreditation standards prevent schools from offering more than the minimum standards.

Proponent for House Bill No. 333

Page 3

The second change would not prevent any person from being moved in the continuation of services as long as that individual would be appropriately served with less restrictions than he had in his previous placement.

It may be that some who oppose the adoption of this definition will say it is not in compliance with federal law. That same argument has been used to oppose any state law about special education that they did not like. I submit that I have studied federal special education laws rather carefully and I believe the proposed definition in House Bill No. 333 is not only well within the federal law, but in fact is much closer to the stated intent of federal law than the interpretation that less restrictive refers to a place of service instead of to the individual.

*Robert L. Laumeyer*

Robert L. Laumeyer

Ex-7

# Helena Medical Clinic, P.S.C.

1930 9TH AVE  
HELENA, MONTANA 59601  
TELEPHONE 442 9523

INTERNAL MEDICINE  
D.B. SPADING, M.D.  
D.R. HESTERMAN, M.D.

January 30, 1981

DAN SMELKO  
Business Manager

OBSTETRICS AND  
GYNECOLOGY  
J.E. DRENNAN, M.D.  
J.E. NICKEL, M.D.  
R.M. BROWNING, M.D.

PEDIATRICS  
E.P. GUNDERSEN, M.D.  
B.C. RICHARDS, M.D.  
J.H. STRICKLER, M.D.

SURGERY  
W.J. HOOPES, M.D.  
K.J. WRIGHT, M.D.  
J.W. HARLAN, M.D.

Representative Ralph Eudaily, Chairman  
House Education Committee

Chairman Eudaily and Members of the Committee:

I am Dr. Jeffrey H. Strickler and I have come to speak in favor of House Bill 333. I am a board certified pediatrician practicing in Helena, Montana with experience in the medical care and evaluation of developmentally disabled and learning disordered children. In addition, I serve on the Advisory Committee to the Region VIII Child Abuse and Neglect Resource Center in Denver, and have served on the Governor's Task Force for Child Abuse and Neglect in Montana.

My interest in child abuse has led me to become involved in the problem of institutional abuse. As you are certainly well aware, the late Judge administration as well as the late Democratic administration in Washington have been much enamored with the concept of deinstitutionalization. Whereas I am in no way attempting to condone the large storage facilities such as the Boulder River School and Hospital, I am deeply concerned with the concept of deinstitutionalization being used as a panacea. The force behind the drive for deinstitutionalization has been the federal concept and mandate of "least restrictive" and the truly ambiguous phrase of "appropriate public education". Representative Marks and other sponsors of House Bill 333 are to be commended to attempting to bring some definition into this ambiguity.

There is a perception among those who believe that institutions are evil; that deinstitutionalization will cure these evils. This of course fails the basic of tenets of logical thought since we unfortunately exist in a society where individuals must remain in either dependency or correctional supervision of the state. Thus the deinstitutionalized individual remains in an institution, albeit smaller and hopefully more humane and comfortable. What we have actually achieved then is decentralization.

Furthermore, from a point of view of abuse, it is no longer acceptable to have good "intent". What is essential is that the "outcome" for the child must be good. Unfortunately, under the concept of deinstitutionalization pushed to the extreme limits of "least restrictive" and most "appropriate public education" much good intentioned activity under the direction of well meaning professionals has had very poor outcomes for

Representative Ralph Eudaily, Chairman  
House Education Committee  
January 31, 1981  
Page 2


the individual handicapped person.

Profoundly retarded - there is a reason why such severely handicapped individuals are not labeled educable or trainable. We have very good data, and excellent results, to show that our efforts in the educable and trainable areas are successful and should be expanded. There is, on the other hand, very little data to show that the outcome of intensive efforts towards the profoundly retarded is rewarding. As a matter of fact, I have seen some very well intentioned activity directed towards the severely handicapped individual which clearly makes no logical sense and may probably be considered abusive. These activities are based on the good intention of one or another professional but are unfortunately without any scientific basis. I think specifically of the expensive exercise in futility that was carried out with public funds by many speech therapists in Montana to attempt to teach the profoundly retarded to speak. When the age and mental condition of the patient clearly made this impossible, it merely put the handicapped person in a very frustrating and unsuccessful situation. The yield of other aspects of intensive education are well intended, but must honestly be considered as purely conjectural.

Society has also been adversely effected by the intemperate application of these precepts of "least restrictive" and "most appropriate education". I have seen some of our finest special education teachers driven out of the field by the frustration of dealing with the profoundly retarded. I have seen communities upset because the normal third grade classroom was filled with thirty four students because the only available room to split the class was taken up by one profoundly retarded individual. I hear the valuable proven programs such as the DD Preschool for the educable and trainable are in jeopardy. I am sure that you all know of other examples.

We should not squash all good intentions, but we must aim them to achieve logical reasonable outcome objectives. I am not suggesting that the present bill will solve all of our problems, but it is a very healthy and legitimate attempt to put some reason back in our definitions. It will give us an opportunity to provide appropriate care, based on the outcome, to handicapped individuals, thereby improving the care and effectiveness to all.

I urge you to recommend passage of this bill.



Jeffrey H. Strickler, M.D.

## House Bill 333

Helena School District No. 1, Helena, Montana wishes to go on record as being in favor of H.B. 333 and the amendments, as proposed by the Office of Public Instruction.

The explanation of "Appropriate Public Education" more clearly defines the equality of educational services provided for handicapped individuals.

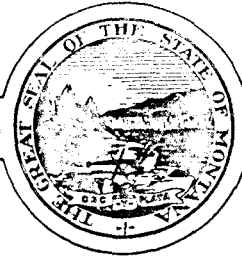
The "least restrictive" and "less restrictive" clarify that the student must always be the prime consideration rather than a location or facility.

We favor these amendments to the laws governing the habilitation of handicapped persons in the State of Montana.



Gerald W. Roth  
Director  
Helena Special Services

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES  
DEVELOPMENTAL DISABILITIES PLANNING & ADVISORY COUNCIL 6X.9



THOMAS L. JUDGE, GOVERNOR

1218 E. SIXTH AVENUE

STATE OF MONTANA

(406) 449-3878

HELENA, MONTANA 59601

January 30, 1981

Re: House Bill 333

Representative Ralph Eudaily, Chairman  
House Education Committee  
State Capitol  
Helena, Montana 59601

Dear Representative Eudaily:

This letter is to inform you that the Montana Developmental Disabilities Planning and Advisory Council opposes House Bill 333.

Our opposition was formalized by a vote of the members at our regular meeting on January 29, 1981.

The Council's opposition to House Bill 333 is based on the following considerations:

1. The Bill is not needed, and would accomplish nothing.
2. The Bill, if enacted, would be a signal of backsliding of public policy affecting Montana's developmentally disabled citizens.
3. The Bill, if enacted, would confuse and complicate Montana statutes, and would likely result in expensive and time consuming clarifying litigation.

Thank you for receiving this statement of opposition to House Bill 333, and for making copies available to the members of the House Education Committee.

Sincerely yours,

A handwritten signature in cursive script that reads "A. A. Zody".

A. A. ZODY, Chairman

cc: Representative Bob Marks

House Education Committee  
Hearing on HB 333  
Testimony presented by Nina Vaznelis  
1/30/81

My name is Nina Vaznelis. I work as a legal researcher for a local law firm and was the mother of a retarded child, who died in 1976. I was living in California at that time and had contact with social service programs in that state. After my son's death, my husband and I moved to Montana; however, I have kept my interest in services for the developmentally disabled. The Montana system seems progressive and sensitive to the problems of these children and their families.

Because of my background in law and my experience as the mother of a mentally retarded child, I am very concerned about the language in HB 333. I feel this proposed change in the current law implies that these children are getting what they need no matter where they are. I feel this language will make it easier for clients to be warehoused where they are now.

Ideally, mentally retarded people should move through the d.d. system as far toward independent living as possible. My son was what they call "educably retarded." Had he reached adulthood, he could have been trained to live on his own and to work to support himself. If HB 333 is enacted, the incentive to move people up through the system will be minimized, if not completely discouraged. The likelihood that M-R people will remain in inappropriate placements will increase. It will be easier to ignore our commitment to help these children grow to the limit of their capabilities.

I am aware of the concern about the severely retarded, however, we cannot allow that concern to impede the progress and education of the educably retarded.

HB 333, if enacted, will provide a good excuse to forget about the clients who are capable of learning more and to keep them exactly where they are today. For these reasons, I oppose HB 333.

January 28, 1981

TO THE MEMBERS OF THE HOUSE EDUCATIONAL COMMITTEE:

We, the undersigned, document with this statement our opposition to House Bill 333.

We believe that the definition of appropriate public education could be deleterious to educational services due to its non-specific nature. Also, this definition could result in a lower quality of education for handicapped children.

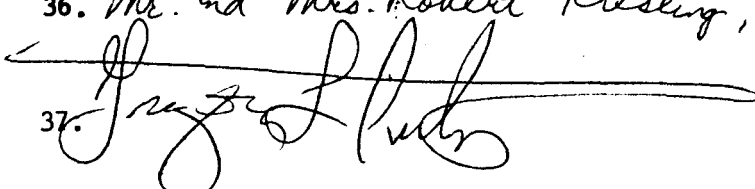
Furthermore, the Bill's new definition of "least restrictive" and "less restrictive", which states that: "Least restrictive" and "less restrictive" mean the necessary restrictions placed on the individual for his protection and habilitation, as well as the protection of others. The terms do not refer to the location of service but to the actual restrictions placed on the individual." This definition is in direct violation of Public Law 94-142, which maintains: "... to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are (to be) educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily....."

This could result in a significant loss in federal funds.

In conclusion, we urge you to vote "no" on this Bill which would most assuredly jeopardize the educational future of our exceptional children.

- |  |   |
|--|---|
| 1. Ken Engellant Chmn. Region II Council     | 16. W.A. (Bill) Iverson (Reg. 2. Delegate)  |
| 2. Jewel Webb, Del. Cut Bank, Glacier Co.    | 17. Villa Lightning Valley Int Delegate   |
| 3. Maria Harrison - Shelby - P.T. Act.       | 18. Quannah Bandy - Liberty Co. Delegate  |
| 4. Fran Nichols - Great Falls - Region II    | 19. Betty L. McKee Region II  |
| 5. Bruce Ann Hall Region II                  | 20. Joyce L. Curtis Region II Council   |
| 6. Ruth Stegert - Simms Region II Del.       | 21. Arthur W. Anderson - Cut Bank Developmentally Disabled  |
| 7. Mary Ellen Petrucci - Choteau - Region II | 22. Dorothy Jane Johnson - Counselor at J-I School, alternate Corporation - Cut Bank, delegate from Liberty Co. |
| 8. Tom Coleman Comad PT Act                  | 23. Bruce K. Jeffery Region II  |
| 9. Roscoe Morley Shelby Reg. II Delegate     | 24. Dan Astheimer (Blaine Co. Activities, Dir.)   |
| 10. Wesley Muddel Region 2 Delegate          | 25. Cferic A Mallo Region II Del. of  |
| 11. Jerry M. Muechel Region II               | 26. Haydon D. Malt - Teton County, P. Malt, Education Director, P. Malt, (Malt)                                 |
| 12. Gloria Bruner Region II                  | 27. Sam Sunwall, Pondera County, Council  |
| 13. Elaine Schuster Region II Hill Co.       | 28. Wallace A. M. Nelson, Great Falls, Cascade  |
| 14. Gary Mummel - District Handicapped       | 29. Colleen McPhee Jacobs, Great Falls, Cascade   |
| 15. W. H. K. - Inverness Region 2 Delegate   | 30. Jimmie M. Guenther, Great Falls   |



31. Linda C. Thomas - Great Falls, Cascade County
32. Patty Gustafson - Great Falls, Region II Child & Family Services
33. Cecilia Planski - Great Falls
34. Mr. & Mrs. Edward V. Ayers, Great Falls, MT
35. Robert J. Tallon, Director, Choteau Activities, Inc.
36. Mr. and Mrs. Robert Kiesling, Haure, Montana - Region II Child & Family Services
37.  Choteau MT, Region II Child & Family Services
38. David W. Johnson, D.D.S., Great Falls, Chairman Region II Child & Family Services
39. Daniel J. Gregier, Great Falls, MT, Region II Child & Family Services
40. Deanne Foley, Great Falls, MT, Board Member  
Cascade County - Region II Child & Family Services
41. Jan Dresch, parent, Great Falls, MT 59405
42. Mrs. John Rickert, Parent - Great Falls
43. John Rickert

I have been a foster parent for developmentally disabled children for several years. I am also a member of the ARC. I have had contact with educational services within institutions and special education services in public schools. I am opposed to HB 333.

The definition of "appropriate education" in this bill will not aide and most likely will hinder the delivery of needed educational services to the handicapped. Since the needs of handicapped and non-handicapped children are different and must be met in vastly different ways, it is not feasible to compare the two groups.

The definition of "least restrictive" is also not good. Montana's services to the disabled ~~xxx~~ and its program to de-institutionalize are better than most other states. We should be proud of this. The definition of "least restrictive" in this bill is a step backwards. It is not a definition which will meet the needs of the handicapped child.

One of the gains in special education services over the past years is to bring the handicapped child back into the normal educational system as much as possible. It is now realized that this is the best way to meet that child's needs. It also is a good way to teach non-handicapped children how to interact with those members of our society who are different.

A definition of "least restrictive" must ~~ix~~ refer to location. HB 333 opens the door to segregation of the handicapped from the non-handicapped. It would allow for blatant discrimination. The handicapped child ~~xxx~~ has the right to go to school with normal children. If special education services are located outside the public school, the child needs will not be met. He would not have the opportunity to model after normal children. Also the learning opportunities would be greatly restricted.

In addition, this definition is in direct conflict with Federal law. The adoption of such a definition will jeopardize Federal funding not only for special education but all Federal education dollars.

HB 333 is a serious threat to quality special education services. Although there have been and always will be difficult situations to deal with in educating the severely handicapped, these problems can be solved. The numerous special education classes located in many public schools across the state are proof of the value of integrated services. Do not allow the progress that has been made in services to the handicapped be undone by this bill.

Shirley Frisch  
Bx 32  
Clancy, MT 59634

Testimony given in opposition to House Bill 333:  
Please enter this into the record.

January 30, 1981

I am Sandra Kelley, parent of a handicapped child. I represent myself, and also an organization of parents and professionals who are concerned with the needs of children: CHIN.

First, the proposed changes to the State law appear to be contrary to the intent of several Federal laws governing the education of handicapped children and prohibiting discrimination against handicapped persons.

A free appropriate education is defined in the regulations of P.L. 94-142 as "special education and related services which:

- a) Are provided at public expense, under public supervision and direction and without charge.
- b) Meet the standards of the state educational agency, including regulations of this part,
- c) Include preschool, elementary school, or secondary school education in the State involved, and
- d) Are provided in conformity with an individualized education program (IEP) which meets requirements..." 121a.4

An individualized education program (IEP), in the regulations, is a written statement which states the special education and related services needed by a child. 121a.340

"Special education" in the regulations, means "specially designed instruction to meet the unique needs of a handicapped child." 121a.14

Thus, by deduction: a free appropriate public education is that education provided at public expense, under public supervision which meets the unique needs of a ~~handicapped~~ handicapped child. It is my recommendation that these words be used as a definition of FAPE, if it be necessary for Montana to re-state the definition already contained in the Federal regulations.

While Section 504 of P.L. 94-142 may state "at least the same as" the non-handicapped child, this statement is by no means intended to limit services to a handicapped child, as one might infer simply by taking the statement out of context and inserting it into law as being attempted here. Section 504 and P.L. 94-142 are laws that work together to benefit the handicapped and both must be followed.

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A further clarification of the meaning of this section is contained in the Federal Register, Volume 43, No. 9, Friday, January 13, 1978:

The general prohibitions against discrimination on the basis of handicap set forth in 25.51 incorporate basic principles that the Department determined, in developing its own regulation, to be inherent in section 504. First, section 504, like other nondiscrimination statutes prohibits not only those practices that are overtly discriminatory but also those that have the effect of discriminating. And it is equal opportunity, not merely equal treatment, that is essential to the elimination of

discrimination on the basis of handicap. Thus, in some situations, identical treatment of handicapped and non-handicapped persons is not only insufficient but is itself discriminatory. On the other hand, separate or different treatment can be permitted only where necessary to ensure equal opportunity and truly effective benefits and services. Federally assisted programs and activities must thus be provided in the most integrated setting appropriate to the needs of participating handicapped persons. (emphasis added)

The intent of both Section 504 and P.L. 94-142 is to insure that the handicapped person is guaranteed an equal opportunity in education and society.

To further quote from the regulations (94-142) Section 121a.320 "Note: The term 'free appropriate public education,' as defined in 121a.4 of Subpart A, means 'special education and related services which...are provided in conformity with an individualized education program...'"

Secondly, the statements defining "least restrictive" and "less restrictive" show a total lack of understanding of the meaning of the terms as contained in the Federal law and regulations. The law does not refer to physical restrictions, but restrictions to learning.

This is carried out in Section 504 as well, where we deal not only with stairs as physical barriers to programs, but also discriminatory lack of access to programs.

While Montana educator-legislators seem to be talking about tying up or locking up a handicapped child - as a means of education? - the regulations state that a handicapped person will be educated with persons who are not handicapped to the maximum extent appropriate. This involves not only academic services, but extends also to non-academic and extra-curricular services and activities. This is the meaning of "least restrictive environment".

Attached are copies of papers taken from a "504 Consumer Guide", approved by HEW, and a PAVE workshop. Both sets explain clearly what is meant at the Federal level by "least restrictive environment".

To refer in Montana law to "least restrictive environment" as physical restraints is to live in the dark ages or at least in the age of the "Snake Pit". P.L. 94-142 and Section 504 of P.L. 92-112 were written to guarantee the rights of handicapped persons to come out of the locked closet and take their rightful place in society as equals, as productive persons to the maximum extent possible. Putting these archaic and discriminatory definitions into Montana law would take Montana out of a position of leadership in special education and place it behind the rest of the country by 50 years.

I urge you to eliminate these not-so-subtle attempts to undermine Federal law, and to design Montana law so that it is in compliance with not only the letter of the law but also the intent of the Federal laws which we are bound to follow.

be held accountable if the child does not achieve all projected goals and objectives in the IEP.

### 3. Free Education

Recipients that operate a public elementary or secondary education program must provide qualified disabled persons with educational and related services (interpreters, etc.) without cost, either to the disabled person or to his or her parents or guardian. This requirement does not encompass fees that also are imposed on non-disabled persons or their parents or guardians. [§84.33(c)].

In some instances, the recipient may refer the disabled person to a program not operated by the recipient. In such cases, the recipient must pay the costs of such a program, including non-medical care and room and board. [§84.33(c)(3)]. However, if the recipient itself has made a free appropriate public education available to the disabled person, but his or her parents nevertheless choose to place the child in a private school, the recipient is not required to pay for the child's education in the private school.

Parents and guardians of disabled persons also should be aware of the fact that if they disagree with the recipient's evaluation, and the recipient is unable to demonstrate that its evaluation is appropriate, the parent has the right to an independent educational evaluation at public expense. This provision is provided for in the Public Law 94-142 regulations, 45 CFR 121a.503(b).

### C. MAINSTREAMING IF POSSIBLE

The Section 504 regulations require recipients to:

"...educate or...provide for the education of each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily..." [§84.34(a)].

The same approach must be taken in providing or arranging for the provision of nonacademic and extracurricular services and activities, including:

1. Meals, recess periods, counseling services, physical recreation, athletics, transportation, health services, recreational activities, special interest groups, or clubs sponsored by the recipient.
2. Referrals to agencies which provide assistance to disabled persons.
3. Employment of students, including both employment by the recipient and assistance in making available outside employment. [§84.34(b), §84.37(a)(2)].

Personal, academic, or vocational counseling, guidance or placement services must also be provided without discrimination on the basis of disability. Additionally, recipients must make sure that qualified disabled students are not steered toward more restrictive career objectives than are non-disabled students with similar interests and abilities. [§84.37(b)]. For example, advising disabled students not to take shop or science classes would, in many instances, be discriminatory.

Disabled students must be given an equal opportunity to participate in physical education courses, interscholastic, club, or intramural athletics, including contact sports. [§84.37(c)(1)]. In a policy interpretation issued on August 14, 1978, HEW stated that the exclusion from contact sports of students who have lost an organ, limb, or appendage (e.g., kidney, leg, finger), but who are otherwise qualified, is a denial of equal opportunity. [43 CFR 36035].

A recipient may offer separate or different physical education and athletic activities only if it demonstrates that such separation and differentiation is necessary in order for the disabled person to benefit from the activity. Even if separate or different physical education or activities are offered, a disabled student may not be denied the opportunity to compete for teams or to participate in courses that are not separate or different. [§84.37(c)(2)].

#### D. EVALUATION AND PLACEMENT [§84.35]

Because the failure to provide disabled persons with an appropriate education is so frequently the result of misclassification (e.g., classifying a partially deaf child as mentally retarded) or misplacement (e.g., putting a partially deaf child in a class for mentally retarded children), the regulations go into considerable detail to avoid such results.

The IEP requirement should reduce the number of cases of misclassification and/or misplacement. In addition, the regulation

# Project PAVE

Parents Advocating for Vocational Education

1201 16th Street, N.W., Washington, D.C. 20036

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## ADAPTATIONS TO THE EDUCATIONAL PROGRAM

(FEDERAL LAW REQUIREMENTS, SECTION 504 AND P.L. 94-142)

A great deal of the practical information developed by Project PAVE is directed toward the necessity for the development of adaptations to the school environment to enable handicapped children to take part in school programs. There is a basic concern that programs be flexible and creative in designing options, that modifications or additional services be made available, that programs be individually developed and adapted for the needs of individual children, and that handicapped children be educated as much in the normal, regular setting as is possible and appropriate.

Most of these ideal and practical ideas about educational planning also find support in the federal laws. When viewed all together, the most fundamental legal requirements indicate that these educational objectives are also legally required.

The laws require that the educational programs for handicapped children reflect the following principles:

1. To the maximum extent appropriate, the education of handicapped children shall:
  - a. take place in the regular educational environment. (121a, 227)
  - b. be provided with children who are not handicapped. (84.34, 121 a 550)

In order to achieve these objectives;

2. Supplementary Aids and Services Shall be Provided in the Regular Environment. (84.34, 121 a 550)

Only if it is not possible to achieve satisfactory educational progress in the regular setting, with the use of supplementary aids and services, can handicapped children be placed in separate programs.

Whether a child is placed in a regular or a special class,

3. Programs shall be designed to meet the individual needs of a handicapped child. (84.33, 121 a 4(d), 121 a 340-348)

This kind of individual planning must include careful evaluation, and placement decisions that involve parents and a variety of teachers, and must result in an Individualized Education Program (I.E.P. under P.L. 94-142.

4. Programs shall use, as needed, a wide variety of special and related services.

Many such services are specifically listed in 121 a 13. And the basic purpose of this wide variety is not forgotten. P.L. 94-142 states in its regulations that:

"The list of related services is not exhaustive, and may include other. . .services, if they are required to assist a handicapped child to benefit from special education."

5. Programs must be made "accessible".

While not all buildings or facilities must be accessible to handicapped children, they still must be allowed ready accessibility to educational programs. This objective can be achieved in a variety of flexible ways. 504 specifically mentions the "redesign of equipment, reassignment of classes . . .assignment of aides . . .or any other methods that result in making (the) program or activity accessible to handicapped persons."

#### A Philosophic Note on Equality

Section 504 is intended to eliminate discrimination against handicapped persons. This is to allow "equal opportunity" to receive education and other services. But it is obvious, and is recognized by the 504 Regulations, that merely allowing a child to attend or be included in the regular setting will not do this. Identical services are, in this case, no guarantee of equal opportunity, because handicapped children may be unable to take advantage of a program without modifications, extra help, different equipment and the like. In short, it is not in the spirit of the law to offer identical programs without adaptations to the special needs of handicapped children. As the introduction to the 504 Regulations states: ". . .it became clear that different or special treatment of handicapped persons because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity."

It is the exciting and difficult task of parents, teachers and advocates alike to begin to develop the kinds of adaptations that allow such special treatment to occur, while also affording the chance to succeed educationally in a way that meets individual needs and, as much as possible, takes place in regular school programs.



regulation. Further discussion of its provisions may be found in paragraph 3 of Appendix A of that regulation (42 FR at 22685-6). A final sentence has been added to the definition listing, for illustrative purposes, some of the diseases and impairments that are included in the term "physical or mental impairment." It should be noted that this definition of handicapped person does not supersede or interfere with the narrower definitions of the term established by statute for specific purposes, such as reduced transportation fares or eligibility for vocational rehabilitation services. Agencies using such definitions may not, however, substitute them for the definition prescribed in this regulation in connection with their implementation of section 504.

It is again noted that drug addiction and alcoholism are included in the list of diseases and impairments. As stated in the proposal, the question of section 504's application to drug addicts and alcoholics was a difficult one on which the Secretary of HEW sought the advice of the Attorney General. In an opinion dated April 12, 1977, the Attorney General concluded that drug addiction and alcoholism are physical or mental impairments and are thus handicaps for the purpose of section 504 if they result in a substantial limitation of a "major life activity."

A detailed analysis of the implications of the inclusion of drug addicts and alcoholics within the scope of section 504 is set forth in paragraph 4 of Appendix A of the HEW regulation (42 FR at 22686). In response to concern again expressed in a number of comments, we emphasize that the fact that drug addiction and alcoholism may be handicaps does not mean that the behavioral manifestations of these conditions must be ignored in determining whether a person is qualified for services or employment. The statute applies only to qualified handicapped persons.

The definition of qualified handicapped person in §85.32 has been adapted from §84.3(k) of the HEW section 504 regulation. Other agencies may wish to supplement its provisions with additional guidance concerning qualifications for specific programs, as was done in §84.3(k) (2) and (3) of the HEW section 504 regulation. Several comments objected to the difference in wording between §85.32(a) of this regulation and section 60-741.2 of the Department of Labor section 503 regulation. No difference in substance is thereby intended; this Department believes that its definition more adequately emphasizes the prohibition against deeming a handicapped person to be unqualified on the basis of functions that are not necessary to the successful performance of the job in question.

A number of comments from the transportation field raised the ques-

tion of whether such factors as safety may be considered in determining whether a handicapped person, especially one who is or has been alcoholic or emotionally ill, is qualified for a job. The Secretary again wishes to reassure recipients that such considerations are appropriate and are not considered a violation of section 504, so long as they are based on facts relating to the individual applicant's qualifications, rather than on assumptions or stereotypes.

Subpart C of this regulation, sets forth guidelines for determining discriminatory practices; these are, in general, minimum requirements. Except where obvious discrepancies in implementation would result, other agencies may exceed these standards if they wish. The subpart is divided into three parts: General, based on §84.4 of the HEW section 504 regulation; Employment, based on Subpart B of the HEW section 504 regulation, and Program Accessibility, based on Subpart C of the HEW section 504 regulation. A more detailed discussion of these subparts than is contained below may be found in Appendix A of the HEW regulation.

The general prohibitions against discrimination on the basis of handicap set forth in §85.51 incorporate basic principles that the Department determined, in developing its own regulation, to be inherent in section 504. First, section 504, like other nondiscrimination statutes, prohibits not only those practices that are overtly discriminatory but also those that have the effect of discriminating. And it is equal opportunity, not merely equal treatment, that is essential to the elimination of discrimination on the basis of handicap. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory. On the other hand, separate or different treatment can be permitted only where necessary to ensure equal opportunity and truly effective benefits and services. Federally assisted programs and activities must thus be provided in the most integrated setting appropriate to the needs of participating handicapped persons.

Several commenters asked about the effect of §85.51 on the previously issued regulation of the Department of Transportation (DOT) implementing the Urban Mass Transportation Act (UMT Act) with respect to handicapped persons. This Department has not reviewed the UMTA regulation because it was issued before the promulgation of these guidelines. In the course of developing its regulation to implement section 504, DOT will undoubtedly examine its prior regulations with a view toward incorporating or revising their underlying concepts in its 504 regulation. The DOT section

504 regulation will be subject to public comment and to review by this Department.

Furthermore, the Department's interpretation of §85.51 on matters of physical accessibility is set forth in §§85.56-58; it is these sections that, in general, should be looked to for guidance on this subject. This observation is also relevant to the many questions raised by commenters concerning the application of various provisions of §85.51 to specific transportation situations. In response to comment, the Department wishes to make clear that it does not construe this section, nor §§85.56-58, to preclude in all circumstances the provision of specialized services as a substitute for, or supplement to, totally accessible services, nor do these sections require door-to-door transportation service. Neither does paragraph (b)(4) of this section require buses to move their regular route stops to the doors of handicapped riders.

Section 85.51 (b)(3) prohibits recipients from utilizing criteria or methods of administration that would have the effect of subjecting handicapped persons to discrimination on the basis of handicap. The main application of this provision is to state agencies that receive federal funds and then distribute the funds to other entities. These state agencies are obligated to develop methods of administering the distribution of federal funds so as to ensure that handicapped persons are not subjected to discrimination on the basis of handicap either by the second-tier recipients or by the manner in which the funds are distributed. The prohibitions of this paragraph, as well as of paragraph (b)(1), apply not only to direct actions of a recipient but also to actions committed through contractual agreements or similar arrangements. This provision is based on the premise that a recipient should not be able to do indirectly that which it cannot do directly.

Sections 85.52-55 contain the basic requirements for the elimination of discrimination on the basis of handicap in employment. These sections should be augmented, where possible, with provisions appropriate to the programs assisted by each agency. Specifically, §85.53 could be supplemented, as is the corresponding §84.12 of the HEW section 504 regulation, with examples of actions constituting reasonable accommodation and with factors to be considered in determining undue hardship; and §85.54, with provisions adapted from the more specific requirements of the parallel §84.13 of the HEW section 504 regulation.

One comment raised an issue of interest to those agencies that decide to augment §85.53 with examples of reasonable accommodation. Because of the tendency of some readers to

House Bill 333 (Marks, Donaldson, Eudaily) To define terms "least restrictive", "less restrictive", and "appropriate public education" as they relate to the laws governing the habilitation of handicapped persons ..... Education Committee Hearing : Friday, Jan. 30, 12:30, Room 129

I am David Lackman, Lobbyist for the Montana Public Health Association. We are testifying in opposition to HB 333.

This proposal places community-based programs for the developmentally disabled at a disadvantage. Definitions contained in the bill would classify Boulder as a non-restrictive environment - which in fact it is not.

As many of you know, a major effort during my term as administrator of the laboratory division was the prevention of developmental disabilities. This also included involvement with DD as they now exist. Institutions, no matter how well intentioned we are, represent a deadend for many. I have been impressed with the accomplishments of community-based programs. There has been a tendency for the public to ignore individual miracles; and to magnify shortcomings.

For an examination of what can be accomplished on a one-to-one basis, I refer you to the Westmont Home for Retarded Children, 721 Cedar Street in Helena. The person to contact is Janet Ford who may be reached at 442-1676 or 443-4140. Mrs. Ford is a psychologist specializing in behavioural modification. She has worked in community-based programs in Helena for four and three-fourths years.

We urge you to consider a "do-not-pass" for HB 333.

*David B. Lackman*  
*Jan. 30, 1981*

On Behalf of the Association for Retarded Citizens, we feel the additions to the Montana Special Education law and the laws which authorize commitments to the BRS&H and Warm Springs are not for the betterment of the education of handicapped children.

In response to "Appropriate public education"; the vagueness of the definition may encourage educators to provide a less quality education to the handicapped child. Delivery and reception of the educational opportunities for the non-handicapped as compared to the handicapped is immeasurable. Meeting the needs of these two separate populations should be individualized.

Secondly, the proposed new definition of "least restrictive" say that location of educational services is not to be considered. This addition would allow for some harmful changes to handicapped children's education.

1. As the definition now reads, handicapped children are able to learn through appropriate peer modeling and observation of non-handicapped children.
2. The positive aspects of educating a handicapped child in the community are numberable. Aside from the educational setting where peer modeling and observation occur, community skills are learned naturally. Exposure to the non-handicapped population is stimulating. Integrating populations enhances the learning responses.
3. In the institutaion setting this proposal would allow educational services to be defined "appropriate." In the community, it would encourage movement for behavior problem children toward segregated classrooms or possibly return to the institution.

Furthermore, this change violates Federal law, Public law 94-142, the Federal Education of the Handicapped Act.

Reprocussion of passage of HB 333 could determine whether Montana will receive its Federal Funding.

We do not support these changes.

*Jenifermer , ARC / Montana*

Testimony of Kenneth A. Rohyans  
Opposing House Bill 333

16

I am opposed to House Bill 333 on several grounds:

In page 1, lines 15 to 18, the definition of "Appropriate Public Education" asks all to view education of the handicapped in the light of education of the non-handicapped. This is patently impossible.

The Congress of these United States was aware of this when it formulated PL94-142. It specified related services to be available in education of the handicapped and required "Individualized Education Programs" be devised and carried out for each handicapped child. What can happen to these if they are viewed in the light of education of the non-handicapped? Because of this vague wording, they can become anything or nothing and the handicapped lose again!

Page 3, Lines 17-21, beginning "Least restrictive" are, I am sure, in violation of PL94-142. PL94-142 speaks of the "Least Restrictive Environment" and nowhere places restrictions on the individual handicapped person. What are these restrictions to be and who is the Godlike person who shall decide them? Our handicapped have been often at the mercy of those who glory in their apparent normality.

The phrase "protection of others" Lines 19-20, Page 3, is particularly aggravating. This is a simple reversion to the old legal language that allowed new born Downs' (mongoloid) babies to be classed as enemies of the state and incarcerated in Warm Springs with subsequent transfer to Boulder River School and Hospital.

This bill poses extreme dangers to those who cannot speak for themselves. I implore you to kill it.

TO: EDUCATION COMMITTEE

opposing HB 333

RE: HB 333

My name is Carolyn Lee Dick. I am a parent of a handicapped child. I am an active member of CHIN (Children in Need), a voluntary group of people advocating for children. I am submitting the following written testimony.

### APPROPRIATE PUBLIC EDUCATION

I feel that this has been clearly defined by the state and federal government.

The Constitution of the State of Montana Article X Education and Public Lands.  
Section 1 Education goals and duties. (Page 31)

- (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.

The definition of "Free Appropriate Public Education" differs somewhat in the two federal laws that govern it. ( 94-142 and 504 ) As noted in Appendix A, "Analysis of Final Regulation Under Part B of the Education of Handicapped Act": ... under Part B, "Free Appropriate Public Education" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP).

The 94-142 regulations are binding on each state that receives money under the Education of All Handicapped Act ; on all political subdivision within the state involved in the education of disabled children, including the state education agency; local and intermediate educational agencies, other state agencies such as departments of mental health and welfare, and the state schools for deaf and blind children; and state correctional facilities.

In reading the federal law 121a.320 Under comments it states:

NOTE. - The term "free appropriate public education," as defined in 121a.4 of Subpart A, means "special education and related services which ... are provided in conformity with an individualized education program... ."

The IEP ( Individualized education program ) is the heart of 94-142. Thus a properly designed IEP addressing a students needs and than carried out

Gwyn Lee Dick

is a free appropriate education.

Section 504 states: each recipient must provide an education which includes "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met... (42FR 42504, Aug. 23, 1977.)

Under Section 504 this would include state education and health agencies, all public schools, and all private schools that receive money from HEW or that participate in programs under Part B.

Summing up the two laws (94-142 and 504) a free appropriate public education must be obtained by the IEP (Individualized Education Plan) and must be uniquely designed to cause equality.

### LEAST RESTRICTIVE

The law requires that a child be educated in the "least restrictive environment". This means: least restrictive to learning, or in other words, where the child is best able to learn. "Each public agency shall insure that... in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs." (121.552) The law provides further that "special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (121a550)

### LESS RESTRICTIVE

Less restrictive is not addressed as such in the Federal rules and regs.

but is NON-COMPLIANCE. The law clearly spells out least restrictive and nothing less than that for compliance.

MSU

## DEPARTMENT OF HOME ECONOMICS

MONTANA STATE UNIVERSITY, BOZEMAN 59717

January 28, 1981

The Honorable Ralph Eudaily  
Chairman of the House Education Committee  
State Capitol  
Helena, MT. 58620

We, the undersigned, strongly oppose the definitions of "least restrictive" "less restrictive", and "appropriate public education" as proposed by House Bill 333.

*Jeanne H. Workman*  
*Marty Campbell*  
*Deraldine Buntjer*  
*Charmaine Kuntz*  
*Uma Stenborg-Mantell*  
*Christina J. Wolny*  
*Debra A. Smithson*  
*Rena Mogu*  
*Michelle Eliza*  
*Mark R. Rye*  
*Gayne K. Series*  
*William D. Johnson*  
*John Sandoz*  
*Allyl Hise*  
*William Bad Bear*  
*Jeanne Nell*  
*Franklin K. Gange*  
*Robin West*  
*Phyllis Dennee*  
*Joe Hise*  
*Janet Nesmet*  
*Joanna Jensen*  
*Cindy Smith*  
*Deannee Lee Chapman*  
*Kimberly Deaton*  
*Karen Wayman*  
*Larry Forwood*  
*Lina Penning*  
*Harvey Carlson*  
*Helene Jean Huitik*  
*Linda K. Gagliardi*  
*Linda K. Gagne*  
*Lynn C. Gault*  
*Lana S. Michael*  
*Jinda Gauden*  
*Brenda Harvey*  
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*Koni Dahl*  
*Martina Samson*  
*Karla Hermann*  
*Charmaine Scholz*  
*Shelly Meyer*  
*Michael J. Boduran*  
*Artell Stenard*  
*Melinda Mount*  
*Bob McDonald*  
*Julie Kozelinski*  
*Diane Statton Probst*  
*Rammy Goshim*  
*Kerry Herrell*  
*Joan Seidlitz*