

HOUSE EDUCATION COMMITTEE

January 24, 1983

The meeting was called to order by Chairman Daily in room 420 of the Capitol Building at 12:40 p.m., with all members present except Representative Donaldson, who was excused.

Chairman Daily opened the meeting to a hearing on House Bills: 192, 196, 310, and 315.

HOUSE BILL 192

REPRESENTATIVE JAMES SCHULTZ, District 48, Lewistown, opened by stating the trustees of any district may not knowingly employ or continue to employ a teacher who is under contract for the same contract period to teach in another Montana School District, unless the teacher has received a written release from the trustees of the district holding that contract. For the past several years, it has become apparent that we have a problem in this area. Teachers sign contracts when they are already under contract to another district. The problem generally happens in the smaller rural schools when the opportunity arises to move up to a larger school. A lot of the time, there is no knowledge of this, but once in a while there is knowledge by the school board that this is going on. The Board of Education currently has the power to revoke a teacher's teaching certificate in these cases. That is rarely done because of the rationale in regard to professional improvement. This bill would make it illegal for a school board to knowingly employ a teacher who is already under contract, unless the teacher receives a written release. Most school districts will release that teacher who wants to move to another school, but occasionally situations develop where it may not be possible. This provision does not address those that are leaving the teaching profession. The bottom line is that any contract entered into in violation of this would be void. It would encourage school administrators to carefully check to see if teachers are already under contract to another district. It would also discourage a teacher from walking out on a district they had already signed a contract with.

PROPOSERS

CHIP ERDMANN, Montana School Board Association, gave an explanation of the background of the bill. A written copy of this information is attached. (see exhibit 1)

JESS LONG, School Administrators of Montana, stated the School Administrators of Montana support House Bill 192. This legislation addresses an age old problem of teachers collecting several contracts from school districts and then choosing the

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contract most advantageous to themselves. Districts are often left without adequate staff, just prior to the opening of the school year. Contract jumping frequently occurs as teachers with contracts in small schools go to a larger school district. This bill obligates the trustees and, obviously the superintendent, to make a thorough investigation of the contract status of each teacher hired. We would ask a "DO PASS" on House Bill 192.

HIDDE VAN DUYM, Executive Secretary to the Board of Education, said school trustees turn to the Board of Public Education with the request to suspend a teacher's certificate. At present, a job negotiation problem is made a certification problem because school trustees now turn to the Board of Public Education with the request to suspend the teaching certificate on the basis of MCA 20-4-110, "material non-performance". This is not what we are meant to address. This bill addresses this problem.

OPPONENTS

JUDITH BURKHARTSMEYER, Montana Association of School Psychologists, said we believe that professional ethics should answer this question. There is already legislation on the books for people signing more than one contract. We receive contracts later than the regular teacher because we are a specialized group, and because of the variety of funding sources we are involved with. We are finding a need to scramble for jobs when this funding is cut. We believe a school district seeking to employ a teacher should ask whether he or she has signed another contract.

Rep. Schultz closed by saying this bill does not address specialists, it is designed to address classroom teachers. I don't think anybody wants to impose a loss of credentials. This bill would relieve the teacher from involvement in a law suit.

Questions from committee. Mr. Erdmann explained that concerning the written release, it is only the trustees that can contract with the teachers. We would hope this would not cause too much delay. It will occasionally happen where a teacher may receive two or three offers from districts. Hopefully the teacher would get a release from the original district before signing with another district.

Rep. Eudaily asked Mr. Erdmann if a teacher could hold several contracts as long as they hadn't been signed. The reply was a contract isn't binding until both parties have signed. The teacher has 20 days to respond to an offer, within that 20 days, he is bound to the first contract he signs.

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Rep. Daily asked if this situation could happen in reverse, where the district may employ someone else before the teacher has signed the contract. Mr. Buchannan responded if that happens, the school district would be bound to both contracts. The school district is absolutely bound to the money part. Once the contract is sent out, the school district is bound.

Rep. Schye commented the law is there, and I don't understand why the school districts don't use it. Mr. Erdmann replied to comply with the law, you must go before the Board of Public Education and suspend the teaching certificate. This is not felt to be an appropriate remedy. The board is predisposed, it is pretty severe to take away their livelihood and profession over something like this.

Chairman Daily closed the hearing on House Bill 192 at 1:00 p.m.

HOUSE BILL 196

REPRESENTATIVE RAY PECK, District 8, Havre, opened by stating as the title of the bill indicated, this bill authorizes the Board of Public Education to adopt policies for the gifted and talented children. There is a need for this authority to be placed with the Board of Public Education and this authority should be granted to them.

PROPOSERS

REPRESENTATIVE ROBERT BACHINI, District 7, Havre, rose in support of House Bill 196 for the benefit of the gifted and talented.

JEFFREY M. KIRKLAND, Montana Mensa, submitted a written copy of his testimony to committee members. (see exhibit 2)

HIDDE VAN DUYM, Board of Education, submitted a copy of his testimony in support of House Bill 196. (see exhibit 3)

HARRIET MELOY, Board of Education, stated in many states gifted and talented programs are within the special education area in the statutes. The special education people do not want the gifted and talented brought into their part of the law. It is just a matter of consistency to duplicate the duties of the board that are designated for special education.

WAYNE BUCHANAN, Montana School Board Association, said we are in favor of the intent of this bill. One of the problems we have with the gifted and talented program is definition.

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NANCY LUKENBILL, Office of Public Instruction, submitted a copy of her testimony on House Bill 196. (see exhibit 4)

OPPONENTS

JUDITH BURKHARTSMEYER, Montana Association of School Psychologists, said we are concerned that this would just add another layer of bureaucracy for the gifted and talented. We are concerned with the use of the word "rule" that implies that the board would be writing rules and regulations, which would mean another bureaucratic layer to deal with. We would like to request that if the bill is passed, the implementation does not become effective until 1984. If school personnel have questions regarding rules and regulations for the current year, this bill would only serve to confuse us.

Rep. Peck closed by saying I think there is one point that is brought up by the opponents that could cause some problems, and that is the effective date. I have a handout pertaining to the question dealing with rules. (see exhibit 5) The reason I was positive about sponsoring this legislation is because I think the board is the group that is most representative of the people. It would be good legislation to grant authority to the board. A state-wide policy for the gifted and talented is just as necessary as it is for the handicapped. The two programs would be consistent if authority were granted to the Board of Public Education to provide some definitions. The administration is already there, and we are just taking advantage of the eight members that donate their time, and of the personnel employed by the state.

Questions to committee. Rep. Hammond asked Mr. Van Duym if he would have any objection to the July, 1984 date. The answer was there is no intent to change the present implementation; no, I would not.

Rep. Miller asked Mr. Van Duym if more positions would have to be added to the department in order to handle the added responsibility. The reply was in no way at all. It is the same statute which states that the board seeks programs that foster education for the handicapped. We would adopt the same policies for the gifted and talented. I revise and review policy every month, this would be a routine task.

Rep. Miller commented there is already a fine gifted and talented program, and I can't see adding another layer of educational bureaucracy to something that is going fine.

The committee went into EXECUTIVE SESSION.

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HOUSE BILL 224

Rep. Kitselman moved House Bill 224, DO PASS, the motion carried unanimously.

HOUSE BILL 192

Rep. Peck moved House Bill 192, DO PASS, the motion carried unanimously.

HOUSE BILL 196

Rep. Eudaily moved House Bill 196, DO PASS.

Rep. Eudaily moved the amendment to make the effective date July, 1984, DO PASS, the motion carried unanimously.

The committee decided to hold off action on the DO PASS motion until they could see a copy of the drafted amendments.

The committee then resumed the hearing.

HOUSE BILL 310

REPRESENTATIVE ROBERT MARKS, District 80, Clancy, opened by stating House Bill 310 is a bill that was suggested to us in areas where there are congestion problems with students living less than three miles from school, who have to go through severe traffic hazards in order to get to school, or who require parents or a car pool to haul them to school. The high traffic hours are not necessarily coincidental with the time school kids have to walk, but there is some time lap. I do think the bill and the concern addressed need some consideration. The transportation committees in the county need to define hazardous traffic situation.

PROPOSERS

WAYNE BUCHANAN, Montana School Board Association, said we applaud the idea behind the bill. It doesn't have a deadline for requests to be in, and it doesn't allow for budget considerations that school districts might be involved in. These areas may need some attention. We would like to be involved in any subcommittee that might meet to work on this bill.

RICHARD TRERISE, Montana Association of County Superintendents, said county superintendents serve as chairmen of county transportation committees. We are in agreement with the bill, with a number of reservations. In addition to points already mentioned, we are also concerned with the process. The way it is currently worded, it requires individual action on each request. Consider giving the transportation committee the right to designate areas that would be covered. My association would be more than happy to assist or give input to a subcommittee.

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OPPONENTS

GARY STEUERWALD, Office of Public Instruction, said OPI endorses the concept of House Bill 310. However, the language and omission of the bill make it impossible to carry out. Should the language be clarified, OPI feels it could support this bill. Specifically, the limits of "undue hazard", and the lack of time lines.

Representative Marks closed.

Questions from committee. Rep. Yardley asked if this bill would create a new basis for liability for school districts. A parent who makes a request, is turned down, and a child is injured, may bring a law suit on the basis that the transportation committee acted without the consideration of all of the elements. Mr. Steuerwald answered this possibility exists today with individual transportation. If they were operating within specific guidelines, I don't think there would be a liability problem.

Chairman Daily appointed a subcommittee for House Bill 310, consisting of Rep. Hammond, Chairman, Rep. Kadas, and Rep. Sands.

The hearing on House Bill 310 was closed at 1:50 p.m.

HOUSE BILL 315

REPRESENTATIVE NORMAN WALLIN, District 76, Bozeman, said this bill has the intent of correcting the law which requires that any alteration plans in a school building shall be submitted to the State Department of Administration for approval. The law does not allow for changes without going through the expense of this time consuming procedure. Many alterations are made without any review procedure. This bill places the trustees in a position of not following the law, and leaves them open to civil action. This bill permits alterations which do not weaken the structure of any building where students are housed or instructed as long as they comply with local building and safety codes.

PROPOSERS

CHIP ERDMANN, Montana School Board Association, presented the committee with written testimony in support of House Bill 315. (see exhibit 6)

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DAVE ASHLEY, Department of Administration, said the Department of Administration will testify as a proponent of the intent of this bill. One of the goals of the department is to locate as many enforcement responsibilities as possible. Because of great expenses at the local level, we do speak as a proponent. We can see two problems. As the bill is currently written, there will be nonstructural remodeling. We feel this bill should be written to allow for local building permits. The department feels that the bill should be broadened to allow enforcement for both structural and nonstructural remodeling.

ROD SVEE, Office of Public Instruction, said we do speak in support of the concept outlined by the previous two gentlemen. As long as safety can be maintained, we speak in favor of the bill.

OPPONENTS

RAY JOHNSON, Montana Chapter of the American Institute of Architects, submitted a copy of his testimony. (see exhibit 7)

Rep. Wallin closed.

Chairman Daily closed the hearing on House Bill 315 at 2:00 p.m.

The committee resumed EXECUTIVE SESSION.

HOUSE BILL 221

Rep. Hannah moved House Bill 221, DO PASS.

Rep. Hannah passed out an explanation of questions pertaining to House Bill 221. (see exhibit 8)

Rep. Hannah moved the amendments to House Bill 221, DO PASS, the motion passed 15-1, with Rep. Sands voting no.

Rep. Hannah moved House Bill 221, DO PASS as amended, the motion passed unanimously.

The meeting was adjourned at 2:20 p.m.


FRITZ DAILY, Chairman


Cheryl Fredrickson, secretary

HOUSE Education

BILL # 192

DATE Jan. 24, 1983

SPONSOR:

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE Education

COMMITTEE

BILL # 196

Date Jan. 24, 1983

SPONSOR

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE Education

COMMITTEE

BILL #310

Date Jan. 24, 1983

SPONSOR

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE

Education

COMMITTEE

BILL # 315

Date Jan. 24, 1983

SPONSOR

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

HB 192 - Background

AN ACT TO PROHIBIT A SCHOOL DISTRICT FROM EMPLOYING A TEACHER WHO IS UNDER CONTRACT TO TEACH IN ANOTHER MONTANA SCHOOL DISTRICT.

For the past several years there has been a problem in Montana of teachers signing a contract to teach in a district while already under contract to another district. The problem generally happens when a teacher in a smaller rural district is offered a contract in one of the larger urban districts. Generally the hiring district is not aware the teacher is under contract, but unfortunately, sometimes they are aware. In these situations, they place the welfare of their district over that of the smaller district who is losing the teacher.

This is a crucial situation for the district who suddenly loses a teacher, sometimes only days before school is scheduled to open.

The Board of Public Education currently has the power to revoke a teacher's teaching certificate in these situations. Often the Board fails to act, pointing out that school districts themselves are creating the problem. Other rationale for taking no action include the "professional advancement" justification. The Board has refused to take action on a teacher who leaves a signed contract on the grounds that "professional advancement" is a justifiable reason.

This bill would make it illegal for a school board to "knowingly employ or continue to employ" a teacher who is already under contract, unless the teacher receives a written release. Most school districts will release teachers who want to move to another school after they have signed their contract. But there are the situations where the smaller districts don't have the time to find a new teacher. In these situations the district should not suffer. The original contract should be binding.

It should be pointed out that this provision does not address those who leave the teaching profession.

The bottom line is that any contract entered into in violation of this provision would be void. It will encourage school administrators to carefully check to see if a teacher is already under contract to another district. It will also discourage a teacher from walking out on a district they have already signed a contract with. Once again, all they need do is obtain a release from the board and they are free to sign with a new district.

HOUSE BILL ~~138~~ 196

TESTIMONY OF JEFFRY M. KIRKLAND

MONTANA MENSA EXECUTIVE COMMITTEE MEMBER

BEFORE THE HOUSE EDUCATION & CULTURAL RESOURCES COMMITTEE

ON MONDAY, 24 JANUARY 1983

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, FOR THE RECORD I AM JEFF KIRKLAND, EXECUTIVE COMMITTEE MEMBER OF MONTANA MENSA, AND OUR ORGANIZATION STANDS IN SUPPORT OF HOUSE BILL 196.

MONTANA MENSA IS A STATE AFFILIATE OF MENSA, A SOCIAL ORGANIZATION THAT IS BOTH NATIONAL AND INTERNATIONAL IN SCOPE. OUR ORGANIZATION HAS ONLY ONE REQUIREMENT FOR MEMBERSHIP, AND THAT REQUIREMENT HAS NOTHING TO DO WITH INCOME, OCCUPATION, ANCESTRY, SOCIAL STANDING, OR OTHER COMMONLY-ACCEPTED SOCIETAL DIFFERENTIATIONS. THE SOLE REQUIREMENT FOR MEMBERSHIP IS TO SCORE IN THE UPPER 2% ON ANY STANDARD IQ TEST.

OUR MEMBERS COME FROM ALL WALKS OF LIFE AND REPRESENT THE BROADEST CROSS-SECTION OF THE COMMUNITY--BUSINESS PEOPLE, STUDENTS, HOUSEWIVES, FARMERS AND RANCHERS, FACTORY WORKERS, DOCTORS, PROFESSORS, TRUCK DRIVERS, SOLDIERS, AND CHILDREN.

WE HAVE MEMBERS IN ABSAROCKE, ARLEE, ASHLAND, BILLINGS, BOZEMAN, BRIDGER, BROWNING, FLORENCE, FORSYTH, GREAT FALLS, HELENA, KALISPELL, LIBBY, LIVINGSTON, MILES CITY, MISSOULA, MOLT, ROUNDUP, TROUT CREEK, AND ULM.

ALTHOUGH OUR ORGANIZATION ITSELF PROMOTES NO CAUSES, TAKES NO STANDS, AND ESPOUSES NO PARTICULAR POLITICAL, RELIGIOUS, OR PHILOSOPHIC CREDO, WE DO HAVE A NATURAL INTEREST IN GIFTED CHILDREN.

NATIONALLY, WE SUPPORT RESEARCH INTO GIFTEDNESS AND EDUCATION OF GIFTED CHILDREN, AS WELL AS OFFER SCHOLARSHIP PROGRAMS FOR GIFTED CHILDREN AND GRANTS FOR EDUCATORS WORKING WITH THEM.

MANY OF OUR LOCAL GROUPS HAVE GIFTED CHILDREN COORDINATORS, VOLUNTEERS WHO MEET REGULARLY WITH SCHOOL BOARDS AND EDUCATORS IN THEIR AREAS. SOME EVEN ESTABLISH "MENTOR" PROGRAMS WITHIN THE LOCAL GROUP SO GIFTED CHILDREN CAN BE STIMULATED BY THE EXPERTISE OF INTERESTED ADULTS IN VARIOUS PROFESSIONS OR HOBBIES. MUSEUM TRIPS, OTHER CULTURAL/EDUCATIONAL ACTIVITIES, OR EVEN JUST SPECIAL GAMES MEETINGS CAN BE SET UP TO PROVIDE EVENTS GIFTED CHILDREN APPRECIATE.

TRADITIONALLY, PROGRAMS SERVING GIFTED CHILDREN HAVE BEEN OF UNEVEN QUALITY STATEWIDE, PRIMARILY BECAUSE OF THE LACK OF FORMAL STANDARDS AND COORDINATED PROGRAMS. OFTEN TEACHERS HAVE BEEN GIVEN THE DIFFICULT TASK OF DEVELOPING PROGRAMS FOR GIFTED CHILDREN WITH LITTLE OR NO GUIDANCE IN TERMS OF COORDINATION OR CONTINUITY OF THOSE PROGRAMS FROM EITHER THEIR ADMINISTRATIONS, THEIR DISTRICTS, OR THE SUPERINTENDENT OF PUBLIC INSTRUCTION. MANY OF THOSE PROGRAMS, IN SPITE OF THE LACK OF A PLANNED, COORDINATED GENERAL PROGRAM, ARE EXCELLENT. SOME ARE NOT.

TO FACILITATE A PLANNED AND COORDINATED APPROACH TO EDUCATIONAL PROGRAMS SERVING GIFTED CHILDREN, MONTANA MENSA STANDS IN SUPPORT OF HOUSE BILL 196 AND URGES THAT THIS COMMITTEE RECOMMEND THAT THE BILL DO PASS.



Board of Public Education

Exhibit 3

BOARD MEMBERS

EX OFFICIO MEMBERS:

d Schwinden, Governor

Ed Argenbright, Superintendent of
Public Instruction

ing E. Dayton, Commissioner
Higher Education

APPOINTED MEMBERS:

len D. Gunderson, Chairman
Billings

Jean Robocker, Vice Chairman
Kalispell

mes Graham
may

George A. Johnson
Great Falls

riett C. Meloy
Helena

Arthur Schauer
Libby

omas A. Thompson
Bozeman

TESTIMONY FOR THE HOUSE EDUCATION COMMITTEE

SUPPORTING HB 196

Hidde Van Duym
Executive Secretary

I am Hidde Van Duym, Executive Secretary to the Board of Public Education.

For several years the Board has been concerned about the need for a statewide policy for gifted and talented children. There is none in existence now.

At the last Board meeting, a mother and father presented materials to the Board which demonstrated that their child was exceptionally gifted, that the public school system was not meeting the child's needs, and that there was justification for special education which they were willing to finance themselves by starting a private school for gifted children. Because the parents were able and willing to meet their children's needs, the issue of the Board's responsibilities in this area was not raised, but under other circumstances it could have been. It was clear that the Board needs a policy for the gifted and talented just as much as it needs it, and has, for the handicapped.

The absence of such a policy is of concern because the Constitution specifically states that "it is the goal... to establish a system of education which will develop the full educational potential of each person." Since the Board has the constitutional responsibility to exercise general supervision over the public school system it is responsible for the educational entitlements of the gifted and talented. The Legislature needs to give the Board the authority to fulfill its constitutional responsibility.

HB 196 provides that authority to the Board. Its text uses the same wording as is found in the statute for the handicapped. No change is intended in the present execution of the gifted and talented programs in the Office of Public Instruction.

There will be no fiscal impact because the bill explicitly leaves the funding of the programs in the hands of the legislature. I call your attention to MCA 20-7-903(2) "must be funded by money appropriated to the Superintendent for that purpose."

I urge you to provide the Board with the needed authority in this area.



OFFICE OF PUBLIC INSTRUCTION

Exhibit 4

STATE CAPITOL
HELENA, MONTANA 59620
(406) 449-3095

Ed Argenbright
Superintendent

January 24, 1983

TO: Fritz Dailey, Chairman
Members of the Committee
House Education & Culture Committee

FROM: The Office of Public Instruction

RE: HB196 - Gifted and Talented

The Office of Public Instruction opposes HB196. We do question the rationale for creating another layer in the administrative process which school districts use in applying for and receiving small grant awards for gifted and talented students.

With the word "rule" in line 21, section 10, page 2, we feel there is a substantial change in the way the program may operate. Although the law has been in place for four years, the gifted and talented money has only been available to districts the last year and one-half. Should the committee choose to pass the bill and give the authority for the gifted and talented program to the State Board of Public Education, we would request the effective date of transfer to be July, 1984.

The 1983-84 grants are presently being distributed to the districts. Several workshops have already been held across the state to enable districts to plan their programs and to have their local "match" in their budget. As you well know, the rule making process is very lengthy. An extended time element would give the districts and the Board of Public Education sufficient time to develop rules and procedures. This would not interfere with current funding procedures. In this way school districts would not lose a year of programming due to the administrative changeover.

If you have further questions, please contact Nancy Lukenbill, Specialist, Gifted and Talented Programs, Department of Special Services, Office of Public Instruction, 449-5660.



OFFICE OF PUBLIC INSTRUCTION

STATE CAPITOL
HELENA, MONTANA 59620
(406) 449-3095

Ed Argenbright
Superintendent

January 24, 1983

TO: Fritz Dailey, Chairman
Members of the Committee
House Education & Culture Committee

FROM: The Office of Public Instruction

RE: Gifted and Talented Criteria and Procedures Committee

The 1981 Legislature appropriated funds for the development of gifted and talented programs in Montana. A total of \$200,000 was allocated for the biennium to assist school districts to strengthen the quality of elementary and secondary education through support of locally initiated proposals and activities designed to improve educational practices for gifted and talented students.

The criteria and procedures for the gifted and talented grants were developed by two working committees set up by Superintendent Argenbright. The first committee drew up the initial framework and submitted their recommendations to a second working committee for review before submitting the final draft to Superintendent Argenbright. The initial working committee comprised the following persons:

Don Gundlach, Administrator, Miles City
Gail Hanninen, Project Director, Gifted/Talented, Kalispell
Nancy Lukenbill, Specialist, Gifted/Talented Program,
Office of Public Instruction
Karen Sexton, Teacher, Project Promise, Helena
Paul Stebbins, Director, Leep Project, Libby
Karen Takach, Parent, Monforton School District

The final review committee included the following:

Senator Bob Brown, Whitefish
Jean Monforton, Parent, Kalispell
Sue Dolezal, Secondary Teacher, Stevensville
Jean Miller Hagen, School Administrator, Red Lodge
Jean Dayton, Office of Commissioner of Higher Ed., Helena
Dr. Ben Surwill, Dean of Ed., Eastern Montana College
Anita Johnson, School Board Association, Lewistown
Andrea Bartelt, Director, PACE, Great Falls

After final review from the committee, the criteria and procedures were approved and submitted to Superintendent Argenbright for final consideration.

MONTANA LEGISLATURE



HOUSE MEMBERS
CHRIS H. STOBIE
CHAIRMAN
FRED "FRITZ" DAILY
MAL HARPER
JAMES M. SCHULTZ

Exhibit 5

SENATE MEMBERS
LAWRENCE G. STIMATZ
VICE CHAIRMAN
H.W. "SWEDE" HAMMOND
PETE STORY
BILL THOMAS

ROOM 138
STATE CAPITOL
HELENA 59620
(406) 449-3064

ADMINISTRATIVE CODE COMMITTEE

TO: Administrative Code Committee
FROM: David S. Niss, Counsel to the Committee
RE: Agency Adoption of "Policy" as "Rules"
DATE: November 4, 1981

Following the Committee discussion at the September 24, 1981 Committee meeting regarding differences between agency "policy" and "rules" and the legal duty of executive branch agencies to adopt "policy" as "rules" because of the requirements of the Montana Administrative Procedure Act, I conducted a survey of several other state rulemaking statutes and court cases to see how other states apply the policy/rules distinction. This memo constitutes the results of that survey.

BASIS FOR APPLICATION OF RULEMAKING PROCEDURE TO AGENCY POLICY

Committee members will recall that the basis for the question of whether agency "policy" must be adopted as a rule under MAPA stems from the definition of "rule" contained in §2-4-102(10) of MAPA. This definition provides as follows:

(10) "Rule" means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;

(b) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;

(c) rules relating to the use of public works, facilities, streets, and highways when the substance of such rules is indicated to the public by means of signs or signals;

(d) seasonal rules adopted annually relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of such rules and rules adopted annually relating to the seasonal recreational use of lands and water owned or controlled by the state when the substance of such rules is indicated to the public by means of signs or signals;

(e) rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide budgeting and accounting system;

(f) uniform rules adopted pursuant to interstate compact, except that such rules shall be filed in accordance with 2-4-306 and shall be published in the administrative rules of Montana. (Emphasis supplied.)

It is fairly clear from this definition that an attempt by an agency to adopt policy which is intended to have the force and effect of law must take the form of a rule. Rules of course are subject to the usual requirements of filing with the Secretary of State, publication in the Montana Administrative Register, and are subject to a provision for an opportunity for hearing. "Policy" therefore is subject to the same rulemaking requirements as rules are generally and if those requirements are not followed, the statement of general applicability might still be called "policy" by an agency but does not have the force and effect of law and cannot be enforced by the agency.

STATUTES AND COURT DECISIONS FROM OTHER STATES

There are no reported Montana cases confirming the interpretation of §2-4-102(10) that enforceable policy must be promulgated as a rule, but there are a considerable number of opinions from other states which have enacted administrative procedure acts defining "rule" in a manner similar to §2-4-102(10), MCA, and requiring central filing and publication of all such rules. The following is a listing of some of the statutory provisions and case law from other states.

New York. Section 102, (2)(a) of the state administrative procedure act defines "rule" as "the whole or part of each agency statement of general applicability or regulation or code that implements or applies law, or prescribes the procedure or practice requirements of any agency ...". In a landmark case often cited by New York and other state courts, the New York Court of Appeals in People v. Cull, 218 N.Y.S.2d 38, 176 N.E.2d 495 (1961), held that an "order" of the state traffic commission, establishing a traffic speed limit in a particular zone, fell within the definition of a "rule". In that case, Judge Fuld is often quoted as follows:

The term, "rule or regulation", has not, it is true, been the subject of precise definition, but there can be little doubt that, as employed in the constitutional provision, it embraces any kind of legislative or quasi-legislative norm or prescription which establishes a pattern or code of conduct for the future. The label or name employed is not important and, unquestionably, many so-called "orders" come within the term (citation to cases omitted).

Similarly, in Dubendorf v. New York State Education Department, 412 N.Y.S.2d 260 (1978), the defendant State Department of Education sought to recoup the amount of a state overpayment made to the plaintiff for the care and education of handicapped children. The basis for the right to recoupment claimed by the state was a "Memorandum of Agreement" between several state agencies in which the amount to be paid institutions such as the plaintiff was purported to be established. The plaintiff claimed it was not bound by the terms of the Memorandum of Agreement and therefore not liable to the state for overpayments because the memo had not been adopted as a rule and did not have the force and effect of law. The New York court agreed and the plaintiff's motion for a judgment to recover the overpayments was therefore denied.

New Mexico. §14-4-2 of the State Rules Act defines "rule" as "any rule, regulation, order, standard, statement of policy, including amendments thereto or repeals thereof issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing such rule or to affect persons not members or employees of such issuing agency. In the case of State v. Joyce, 614 P.2d 30 (1980), the New Mexico Court of Appeals considered the question of whether the state could convict a person of trespass because he had violated a policy of the board of regents, relating to access to university property, which policy had not be adopted as a "rule". In that case the state tried to escape the effect of the State Rules Act by arguing that the policy established by the board of regents was not a "rule" within the meaning of the Act. The Court of Appeals held that "the state's argument that the policy established by the board of regents is not a 'rule' within the meaning of the act is frivolous. It is without question that the statement of policy by the board of regents was a 'rule'". Because of the state's failure to adopt the policy as a rule, the defendant's conviction was reversed and the defendant discharged from custody.

Oregon. Oregon Revised Statutes §183.310(7)(a) defines "rule" as "any agency directive, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency." In Ortiz v. Adult and Family Services Division, 609 P.2d 1309 (1980), the Division issued an order suspending the plaintiff's unemployment assistance payments because he had refused work without "good cause". While the statute allowed the Division to suspend payments for refusal to accept employment without "good cause", the state agency had failed to define what constituted "good cause" in any rule. The state agency argued that it had a definition of what constituted "good cause" in its office manual for caseworkers, but the court held that "policy statements not promulgated under the administrative procedure act's rulemaking provisions are not rules, ... and thus the Division had no rule defining good cause for refusing employment in effect at any stage of its proceedings against the petitioner." Because there was no rule in effect, the court ordered that a corrective payment be made to the petitioner for assistance withheld during the "unlawful suspension".

Connecticut: The Uniform Administrative Procedure Act, General Statutes §4-166(7) defines "regulation" as "each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." In Salmon Brook Convalescent Home, Inc. v. Commission on Hospitals and Health Care, 417 A.2d 358 (1979), the Commission refused permission for Salmon Brook to increase its per diem rate for private, self-paying patients residing at the facility because the rate proposed by Salmon Brook was in excess of the rate allowed by the Commission. Salmon Brook contended, however that the rate allowed by the Commission was not valid inasmuch as it constituted only a guideline because it was an unpromulgated regulation not adopted in accordance with the provisions of the Uniform Administrative Procedure Act. The Commission claimed that its so-called "guidelines" were not used as "regulations" and therefore did not have to be adopted in the manner prescribed by the Uniform Administrative Procedure Act. The Supreme Court of Connecticut found that "the label which the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact". Because the Commission had used its "guidelines" to deny the increase requested by Salmon Brook, the Court found that it had used the guidelines as regulations and "that the so-called guidelines" were "regulations is patent. They were applied as substantive rules. Their use has a substantial impact upon those regulated by the Commission who file applications such as the Salmon Brook application". For this reason, and because the guidelines had not been filed and published in accordance with the administrative procedure act, the court reversed the decision of the agency.

ANALYSIS

The similarity in the various state definitions of "rule" and the resulting court decisions outlined above is largely a result of the fact that most of the states' administrative procedure acts are copied to a greater or lesser degree from the Revised Model State Administrative Procedure Act adopted by the National Conference of Commissioners on Uniform State Laws in 1961 and adopted to a large degree in Montana by Ch. 2. Ex. L. 1971. The written comments of the Administrative Procedure Subcommittee of the Legislative Council which prepared the draft of the original Montana Administrative Procedure Act, in conjunction with Professor John P. McCrory of the University of Montana Law School, show that the definition of "rule" in §2-4-102(10) is taken directly from the provisions of the Revised Model Act of 1961. See, subcommittee comments to §2-4-102, MCA annotations. Because of the similarity in language and purpose of the various state administrative procedure acts, the Montana courts should rely upon the types of court decisions cited above in order to construe the effect of an agency's failure to adopt policy as a "rule".

No cases have been found based on the definition of "rule" holding that an agency which did not have the authority to adopt rules also did not have the authority to adopt policy. However, if the agency

intends the policy to have the force and effect of law, such a conclusion is the logical result of the definition used in 2-4-102(10). An agency may be able to adopt policy, which may actually serve as "guidelines" without statutory authority for that adoption, but if the agency intends to enforce that policy as a matter of law, it must then have "expressly delegated authority to promulgate rules", in accordance with §2-4-102(11), and must follow the procedure established by MAPA for the adoption of rules. Thus, whether or not an agency need follow the Montana Administrative Procedure Act will depend in most if not all cases upon whether it intends to enforce the "policy" or what legal effect it would ascribe to a violation of that "policy".

DSN:hm

Explanation of HB 315
Delete DOA Approval Requirements

This bill would delete the requirement that plans and specifications be submitted to the Department of Administration for the purposes of repairing or remodeling school buildings. The current law requires that all plans be submitted for the building, enlarging, remodeling or repair of all school buildings. There is no cost limit or project size limitation in the current law.

The proposed changes would require approval of the DOA only for school structures in which students are housed or instructed. It would also only require DOA approval for building, enlarging, or structurally remodeling the school structure. Any repairing or nonstructural remodeling would not need to be approved.

The idea is to exclude repair and remodeling projects which do not structurally alter the building from DOA approval. DOA approval is time consuming and costly, and frankly in many instances is being ignored.

By making the law a little more reasonable, more districts will be willing to follow the requirements.

Ray Johnson

Montana Chapter American Institute of Architects

At the present time there are 55 communities in the State that have some sort of building code certification from the State Building Codes Division. With the major cities such as Billings, Great Falls, Missoula, Butte, Helena and Bozeman offering complete code review. The remaining communities are licensed by the State Code Division to review for codes in certain areas such as energy, plumbing, etc.

At the present time all school systems must submit proposed building projects to the State Codes Division as to their compliance with the codes adopted by the State of Montana. While this is somewhat of an inconvenience, and an added expense to the school districts it does assure the school systems of a thorough and professional code review and a building which meets the safety codes.

Non-structural modifications are often of the nature that cause the most code violations such as dead-end corridors, rooms without required exits, exit corridors with out door closers, closing of window exits, loss of required ventilation and light. This bill as drafted seems to leave a great many community school systems in limbo as to what code reviews are required. If a community does not have local Building and Safety Codes, does this mean they do not have to meet any codes?

The small amount of inconvenience and cost that is now incurred for code review is a very small price to pay for a complete and professional code review which will insure the safety and health of the students and staff of our schools.

The Montana Chapter of the American Institute of Architects recommends that the present system of school building code review remain as it is until such time as all communities have code reviewers licensed by the State Codes Division in all code areas.

This proposed legislation opens the door for other organizations such as the Tavern Owners Association etc., claiming that there are two sets of rules; one for the schools and one for the rest of us. This could lead to further softening of the code enforcement when it should be strengthened.

We would recommend that this proposed legislation not be passed as it is currently written. If this legislation was rewritten to insure that proposed plans would receive at least as good a code review as they now receive from the State Codes Division and such review be done by some one liscensed by the States Code Division we would not have any serious reservations about it. The health and safety of ALL THE STUDENTS AND STAFFS IN ALL THE SCHOOL SYSTEMS is what we want to see maintained in this State.

SENATE MEMBERS

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BURT L. HURWITZ
BOBBY SPILKER



Exhibit #8

Montana Legislative Council

State Capitol
Helena, MT. 59620

(406) 449-3064

21 January 1983

DIANA S. DOWLING
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CODE COMMISSIONER
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ROBERT PERSON
DIRECTOR, RESEARCH
SHAROLE CONNELLY
DIRECTOR, ACCOUNTING DIVISION
ROBERT C. PYFER
DIRECTOR, LEGAL SERVICES

H.B. # 221

TO: Rep. Tom Hannah

FROM: Bob Person *BPV*

RE: HB 221

Here is the information on the questions raised regarding
HB 221:

1. Did the drafter (Greg Petesch) check to see if there were conflicts with other state laws? Yes he did. He told me he found no conflicts. A list of statutes checked is filed with the bill drafting request.
2. How could the bill better provide for protection of the kinds of personal records that seemed appropriate for permanent retention? As I suggested, the bill could be amended on page 1, line 16 by striking "or" and inserting "and" in its place. This would require a minimum retention period of 5 years for all records after which a determination could be made as to whether the records were in fact worthless. Without the amendment, records could, perhaps, have been destroyed after 5 years regardless of their value.

Please note that Section 2 of the bill refers to standards of accreditation which provide some administrative control over record retention. Through accreditation authority there are apparently some state standards for retention of records that provide additional protection.

STANDING COMMITTEE REPORT

J January 24, 1983

SPEAKER:

MR.

We, your committee on **EDUCATION AND CULTURAL RESOURCES**

having had under consideration **HOUSE BILL** Bill No. **192**

first reading copy (**white**)
color

"AN ACT TO PROHIBIT A SCHOOL DISTRICT FROM EMPLOYING A TEACHER
WHO IS UNDER CONTRACT TO TEACH IN ANOTHER MONTANA SCHOOL
DISTRICT; AMENDING SECTION 20-4-201, MCA."

Respectfully report as follows: That **HOUSE** Bill No. **192**

~~DO PASS~~

STANDING COMMITTEE REPORT

February 4, 83

19.....

SPEAKER:

MR.

EDUCATION AND CULTURAL RESOURCES

We, your committee on

HOUSE

196

having had under consideration Bill No.

first

reading copy (white)
color

"AN ACT AUTHORIZING THE BOARD OF PUBLIC EDUCATION TO ADOPT
POLICIES FOR PROGRAMS TO SERVE GIFTED AND TALENTED CHILDREN;
AMENDING SECTIONS 20-2-121, 20-7-903, AND 20-7-904, MCA."

HOUSE

196

Respectfully report as follows: That..... Bill No.

be amended as follows:

1. Title, line 8.

Following: "MCA"

Insert: "; and providing an effective date"

2. Page 2, line 21.

Following: "adopt"

Strike: "rules"

Insert: "policies"

3. Page 4.

Following: line 24

Insert: "Section 4. Effective date. This act is effective
on July 1, 1984."

AND AS AMENDED

DO-PASS

HOUSE BILL 126

MR. SPEAKER

WE YOUR COMMITTEE ON EDUCATION, HAVING HAD
UNDER CONSIDERATION HOUSE BILL NO. 126, FIRST
READING COPY WHITE, ATTACH THE FOLLOWING STATEMENT
OF INTENT:

"STATEMENT OF INTENT
HOUSE BILL NO. 126"

A statement of intent is required for this bill because it delegates rulemaking authority to the Board of Public Education to adopt policies for programs serving gifted and talented children.

It is contemplated that the rules will address the following:

- (a) a policy statement fostering development of programs serving the gifted and talented;
- (b) acknowledgement of the provisions in 20-7-904, MCA, regarding review of programs by the Superintendent of Public Instruction; and
- (c) an annual review of services to gifted and talented children by the Board of Public Education.

STANDING COMMITTEE REPORT

January 31, 1983

19.....

SPEAKER:

MR.

EDUCATION AND CULTURAL RESOURCES

We, your committee on

having had under consideration **HOUSE** **315** Bill No.

first reading copy (white)
color

"AN ACT ALLOWING NONSTRUCTURAL REMODELING AND REPAIR OF SCHOOL BUILDINGS WITHOUT APPROVAL OF THE DEPARTMENT OF ADMINISTRATION; REQUIRING REMODELING AND REPAIR TO BE IN COMPLIANCE WITH LOCAL BUILDING AND SAFETY CODES; AMENDING SECTION 20-6-622, MCA."

Respectfully report as follows: That **HOUSE** **315** Bill No.

be amended as follows:

1. Title, line 4 through 8.

Following: "ALLOWING"

Strikes: line 4 through "CODES" on line 8

Insert: "SCHOOL BUILDING PLANS AND SPECIFICATIONS TO BE REVIEWED AND APPROVED BY THE GOVERNMENTAL ENTITY HAVING STATE BUILDING CODE ENFORCEMENT JURISDICTION"

2. Page 1, line 15.

Following: "be"

Strikes: "i"

3. Page 1, line 16.

Strikes: "(a)"

Following: "or"

Strikes: "structurally"

XXXXXX
DO PASS

January 31, 1983

19

4. Page 1, line 19.

Following: "administration"

Strike: ":"

Following: "or"

Insert: "a municipality or county with a building code adopted as provided in 50-60-301."

5. Page 1, line 20.

Strike: subsection (b) in its entirety

6. Page 1, line 23.

Following: "(1)"

Strike: "(a)"

7. Page 1, line 25, and page 2, line 1.

Following: "with the"

Strike: the remainder of line 25 to "department" on page 2, line 1

Insert: "applicable building code"

8. Page 2, line 4.

Strike: line 4 through "administration"

Insert: "required in subsection (1)"

AND AS AMENDED

DO PASS