MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

February 11, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on February 11, 1987, at 8:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Eudaily who was excused.

HOUSE BILL NO. 393: Rep. Lory, District No. 59, sponsor, stated this bill comes at the request of the Department of Labor and Industry, specifically, the Human Rights Commission. He submitted written testimony. (Exhibit A). He introduced Anne MacIntyre of the Commission staff to discuss the specifics of the bill.

PROPONENTS: ANNE L. MACINTYRE, Human Rights Division, stated the staff of the Human Rights Commission has a statutory mandate to investigate and conciliate cases filed with it. Therefore, there is a strong emphasis on the mediation and conciliation aspects of the process. In fact, the Commission is able to dismiss or settle a majority of the cases filed without hearing or litigation. In October of 1986, in University of Montana Foundation vs. Human Rights Commission, the Montana Supreme Court determined that the Commission's interpretation of the statute was incorrect and held that the legislature granted the agency a total of 12 months within which to complete the administrative process when a party has requested removal. HB 393 does not reverse the Supreme Court ruling. If this bill is enacted, after a case has been pending for 12 months, either party still has the right to remove the case. The bill also provides that a party could waive the right to request removal. This bill would improve the process for removal to district court and make the Commission's procedures more meaningful. She submitted written testimony. (Exhibit B).

FREDERICK SHERWOOD, Attorney from Helena, served as staff counsel for the Commission from 1978-1982 and expressed his support for HB 393. He explained the bill addresses some weak spots in the present system of transition between the Commission and district courts when such a transition is triggered by the issuance of a "right to sue" letter. He further pointed out that he is less enthusiastic about proposed new subsection (2)(d) of subsection 49-2-509 and 49-3-312, which would allow the Commission staff to refuse

to issue a right to sue letter in matters of "first impression". He submitted written testimony. (Exhibit C).

F. WOODSIDE WRIGHT, Attorney from Helena, supported HB 393 and stated there is a need for clear guidelines for the Human Rights Commission and a set of standards that would allow fairly easy removal of certain types of cases from the HRC to district court. The current statute is confusing. This bill would help move along the cases that the HRC must see.

ANN BROADSKY, Woman's Law Caucus from the University of Montana School of Law, stated this bill strikes a good balance between the interests of moving a case forward into district court. The process stated in HB 393 is less costly and more efficient for society. She urged passage for this legislation.

OPPONENTS: LEORY SCHRAMM, Chief Legal Counsel with the Montana University System, pointed out this bill reverses the 1983 amendment. He stated 12 months is enough time for the Human Rights Commission. The exceptions on page 2 are too vague and should be set out so that if a party fails to comply with a lawful subpoena then that might be a reasonable exception, but the language in the bill does not say that. He requested that a serious look should be taken with HB 393.

There were no further opponents and no questions from the committee.

Rep. Lory closed the hearing on HB 393.

HOUSE BILL NO. 399: Rep. Manuel, District No. 11, sponsor, requires legislative approval of administration rules implementing the provisions of the Montana Human Rights Act that prohibit sex discrimination in education.

PROPONENTS: C. MORTON, Executive Secretary for the Board of Public Education, supported HB 399, but stated they do not want their support of this bill to be misinterpreted. They definitely support equity and they believe the Human Rights Commission fulfills a very real need in the State of Montana. The Board of Public Education is constitutionally responsible for setting policy for the public schools. One of the major forums for school people, in which policy is set and distributed, is the Montana School Accreditation Standards. Public school boards and administrators have come to rely on these standards as their base for determining that they are meeting Montana rules. In conclusion, she stated that the Boards of Education supports HB 399 because it feels that the proposed rules on sex equity in education

of the Human Rights Commission are not needed. The proposed rules, or other rules they may develop in this area, are not needed for public education because there is currently an administrative rule which covers this topic in place. She submitted written testimony (Exhibit A) and a handout (Exhibit B).

JOHN LARSON, representing the State Superintendent of Public Instruction, rises in support of HB 399. He stated that this bill will prevent unnecessary expense and duplication.

RONALD WATERMAN, Montana High School Association, stood in support of HB 399. As for the other speakers that have supported the bill, they are not appearing in support of that bill because they are opposed to sex equity but to the contrary. They support and believe they are strong advocates for sex equity in the area of extracurricular activities. They also felt that bringing the rules and regulations to this body, rather than the Human Rights Commission, will bring reason to the subject under consideration. By introducing reason, unnecessary duplication will be avoided. (Exhibit C) was submitted for the record from the 1983 session on HB 879.

BRUCE W. MOERER, Montana School Board Association, supported this legislation.

OPPONENTS: MARGERY H. BROWN, Chair of the Human Rights Commission, stated the Commission has been entrusted with enforcing discrimination laws in Montana through the contested case process and through rulemaking authority granted by this legislature. This rulemaking authority mandates that the Commission promulgate rules under the Montana Human Rights Act. Attached as (Exhibit D) are copies of the provisions of the Montana Human Rights Act and the Governmental Code of Fair Practices which outlines the individual's right to be free from sex discrimination in education in Montana and the Commission's legislative authority to promulgate rules. She stated that the HRC respectfully requests that HB 399 do not pass. The HRC has carefully and deliberately followed the legislative mandate given to the Commission in the area of sex discrimination in education. Prohibiting the Commission from adopting these rules would not effect the underlying law, nor do they believe that that could be the Legislature's intent. The effect of the bill would be to preclude the Commission from advising the public of their construction of the law they administer. It is difficult for them to see wisdom in such action. She submitted written testimony. (Exhibit E).

SUSAN SACHSEMAIER, Women's Lobbyist Fund, stated this bill singles out educational equity rules for legislative

approval. She asked why these rules in particular have been chosen. The Lobbyist Fund views this bill to be an effort to obstruct further progress in educational equity. HB 399 aims to obstruct progress in sex equity, an area of importance to our state's young women, men and children. She urged a do not pass. She submitted written testimony. (Exhibit F).

MARTHA ONISHUK, Legislative Chair of the Missoula League of Women Voters, stated that the League has been following the HRC educational equality rulemaking for the last three years. Evidence at these meetings and hearings and in the settlement agreement review of the Ridgeway suit have shown discrimination still exists in Montana schools. Defeat of this bill was encouraged. Written testimony was submitted by Ms. Onishuk. (Exhibit G).

BARBARA HOLLMANN, stated that proposed guidelines by the HRC are excellent standards and she urged opposition to this bill.

NANCY DEDEN, Missoula, submitted testimony which included documentation (Exhibit H 1-12) on how and why the Human Rights Commission is involved in making equality rules for the schools of Montana. She stated the process of having the HRC develop rules and guidelines for Montana schools has been a slow and painstaking undertaking by all people involved in eliminating the discrimination which exists in schools. This work should have been developed in 1972, we are 15 years behind, she said. The attitudes of the educational leaders of Montana are in the dark ages. Money is short, and time for young women in educational systems is short, we must begin, let us begin here and when they are developed, let us enforce them with the same vengeance that has been used in Montana to fight the equalizing of education for Montana females.

MAUREEN JONES, Women's Opportunity and Resource Development, and Director of the Sex Equity in Vocation Education project in Western Montana, stated that she supports full implementation of sex equity in education, therefore, she opposes HB 399. She submitted written testimony. (Exhibit I).

ANNE BRODSKY, Woman's Law Caucus, Montana Student Bar Association, University of Montana Law School, Missoula, stated primarily, her testimony focuses on the lack of need for this legislation, in light of existing statutory provisions with respect to agency promulgation of administrative rules. She submitted written testimony. (Exhibit J).

MARY GIBSON, President of the Montana Division of the American Association of University Women, Kalispell, stated

that AAUW recognizes the importance of the HRC and opposes any attempt to weaken its authority. She submitted written testimony. (Exhibit K).

KATHERINE CADY, Bozeman; MARGARET ENGLISH, Helena; DAVE HARTMEN, Montana Education Association, went on record in opposition to HB 399.

JOHN G. FRANKINO, Teacher, member of the state's advisory committee on sex equity, and former chair of the Human Rights Commission, believed that the HRC is the proper body to process education equity cases in Montana and to make rules necessary to that end. He submitted written testimony. (Exhibit L).

DR. JOHN W. KOHL, Dean, College of Education, Montana State University, offered several points to refute the need for HB 399. He submitted written testimony. (Exhibit M).

JANICE K. WHETSTONE, Attorney, Bozeman, submitted written testimony (Exhibit N) and stated this bill relates to the requirement of legislative approval of administration rules implementing the Montana HRC Act that prohibits sex discrimination in education. She believes that the ultimate effect if this bill actually becomes law is to make it impossible to enact the administrative rules necessary to implement the provisions of the act. The thrust of the act that prohibits sex discrimination in education needs to be immediately implemented. She pointed out that Montana is at its very strongest when all of its citizens have the opportunity to reach their fullest potential in all endeavors.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 339: Rep. Addy asked Rep. Manuel why the bill does not just state who has jurisdiction and he stated the policy is already set. Rep. Addy asked Ms. Morton what level of communication should the HRC have used. She stated that it would be appropriate for them to let her know they were considering the rules and to find out what rules we have so we could all work together on this.

Rep. Rapp-Svrcek asked Rep. Manuel if there is any other area in which rules are promulgated that the legislature has prior approval of those rules. He answered that there are. Rep. Rapp-Svrcek asked Mr. Waterman if he believes there is reason in the promulgation of the rules of HRC. He stated that under the circumstances of duplication, the issues raised relative to whether an additional set of standards would introduce another element of rights and remedies and further duplicate matters, were not heard during the hearings before the HRC. He felt the expertise is in the legislature for examination of proposed rules.

Rep. Mercer asked Mr. Larson if there is an attempt to take the HRC out of this area. He stated that there is no attempt to preempt. It is a special area where we have several agencies working, and an area where the legislature can set the priorities as to who is to do what. Rep. Miles questioned Rep. Manuel on why all of the other rulemaking that goes on in the state agencies have an administrative process set up and we have an administrative code committee that is the body for appeals and why should sex discrimination rules not follow the same procedure. Rep. Manuel stated that it was not a formal hearing but there was opposition from the administrative code commissioner committee on this same subject and there was nothing done about it because the session was coming up. Rep. Miles asked who is going to determine whether or not it is a substitive rule that needs legislative approval. Rep. Manuel pointed out that any rule on this subject would have to have legislative approval. Rep. Hannah asked Ms. MacIntyre why HRC believes it is their responsibility for writing the rules. She stated that the reason the HRC believes it has authority in this area is that there is a specific state statute, section 49-2-307, which this legislature has enacted that says it is illegal to discriminate on basis of sex in education and it gives the enforcement of that statute to the HRC. It is important to recognize that this bill does not do anything to that underlined statute. The rules that have been proposed to date cannot be adopted and we must go back to the drawing board and get approval for any future rules. This is not a turf fight, she stated, and there are legitimate reasons that the Board of Public Education and the Office of Public Instruction would be concerned about sex equity in education and we commend their actions in this area and their concern but it does not take away from our underlined responsibility under the act. Rep. Addy asked Rep. Manuel if he is saying that we should go back and reintroduce HB 879, from the 1983 session, and that the legislature should set forth all of the guidance that can be set forth in this area. He stated, "no". Rep. Addy stated that is exactly what will happen if the HRC comes up with proposed rules and then comes into the legislature in 1989 and submits them. We would be engaging in the rulemaking process and we are just too busy for that. Rep. Manuel stated that will probably not happen. Rep. Addy wondered then if Rep. Manuel was saying that the legislature should never consider rules promulgated by the HRC and Rep.Manuel stated, "that is what the bill is asking". Rep. Manuel stated that this bill is an expansion of rulemaking and asked for passage of HB 399, in closing the hearing.

<u>HOUSE BILL NOT. 400</u>: Rep. Manuel, District No. 11, stated this bill prohibits age discrimination in housing, and he is

not against children. In 1985, rules were adopted that go into effect July 1, 1987, regarding this subject. There is no case law in the State of Montana supporting the view that Montana's Human Rights Act prohibits refusal to sell, lease, or rent housing or property to a person because of the age of a person residing with him.

PROPONENTS: LARRY WITT, Bozeman Landlord's Association, supported HB 400. He stated that the Human Rights Commission Rule 24-9-1107 is both vaguely written and lacking in some important exemptions. In an age of increasing litigation, such vague language will only breed more lawsuits. Just what constitutes age discrimination needs to be spelled out in detail. Many questions exist with the rule as it is written. The landlord needs the right to determine how much risk he is willing to take and set his own guidelines and age limits for children. He submitted written testimony. (Exhibit A). He also submitted a copy of the HRC Rule 24-9-1107. (Exhibit B).

MARTY HELLER, Landlord for a Senior Citizens Complex, Helena, representing the senior citizens who live in his building, stated some residents require a quiet atmosphere. They have chosen to live where it is quiet and take comfort in living in that type of atmosphere. On their behalf, he requests that HB 400 be passed.

BOB HELDING, Montana Association of Realtors, Missoula, stated the ability to utilize your own property the way you desire is a privileged right. The landlord should have the right to manage his property the way he sees fit. He submitted written testimony. (Exhibit C).

ELMER FLEER, President of the Billings Chapter of the Montana Landlord's Association, pointed out they are in support of this bill because they recognize that each age group has its own life style and needs. The family group has different needs than the young adult or senior citizens. He stated that if landlords can target their clientele then they can give better services to that clientele.

BRIAN MCCULLOUGH, President of the Helena Chapter of the Montana Landlord's Association, stated that the issue of this bill is property rights, property risks, liability, economic growth and law enforcement. He urged support for this legislation.

JANE WESTER, Realtor, Helena, stated there is not a problem in Helena for finding housing if you have children. She supported this bill and hoped it would not open a can of worms by letting this rule go into effect.

OPPONENTS: JACK M. MCLEAN, a member of the Mt. Human Rights Commission, stated he believes the purpose of this bill is to permit landlords to discriminate against tenants with children. Although he neither supports nor opposes that policy, he does not believe this bill is the appropriate way to achieve that policy. He urged the legislature clarify the legislative intent of the discrimination in housing act by addressing the underlying statute, rather than just repealing the administrative rule. He submitted written testimony. (Exhibit D).

MARIE SCRIEBER, Great Falls, questioned the morality of the bill. It seems to promote splitting up families or segregating families who rent as if they were aliens. She stated children are our future, we must allow them to grow into that future with their self esteem. She submitted written testimony. (Exhibit E).

KAREN ANDERSEN, Chairperson of the Mt. Low Income Coalition, Butte, stated that children should not be made to suffer because of an economic status that they have no control over or because of their age. This type of action is terribly unjust, especially because houses available to people with children are usually in the worst or most neglected neighborhoods. She asked that a ruling be made in favor of children and vote against HB 400. She submitted written testimony. (Exhibit F).

MARCIA YOUNGMAN, Member of the Bozeman Housing Coalition, stated that discrimination is going on in Montana by looking at the "no children allowed" ads in the newspapers. She asked that the Human Rights Commission Act not be crippled by the passage of HB 400. She submitted letters from several people as documentation of the housing problem people face who have children. (Exhibit G-K).

MARTHA ONICHUK, representing the League of Women Voters, opposed this bill because they believe that it is unnecessary. The administrative code committee already has the power to overlook rules and make amendments and we think it might be a bad precedent in the short time of the legislature to start reviewing rules of agencies. She submitted written testimony. (See Exhibit G, under HB 399).

JOANNE PETERSEN, Attorney from the Bozeman Housing Coalition, stated this is a serious problem for families. She strongly opposed the legislation.

LOIS M. DURAND, Butte Community Union, and Montana Low Income Coalition, opposed this bill because of the discrimination involved. She requested that a careful and fair decision be made concerning the bill.

KATHARINE CADY, Women in Transition, Bozeman, went on record in opposition to this legislation.

WILBUR JOHNSON, Concerned Citizens Coalition, Great Falls, went on record in opposition to discrimination and HB 400. He submitted written testimony. (Exhibit L).

SANDY CHANEY, Women's Lobbyist Fund, stated the procedural requirements set forth in this bill appear to create an unnecessary exception to the general procedural methods for rule adoption under the MT Administrative Procedures Act. This legislation is unnecessary. She submitted written testimony. (Exhibit M).

JOHN ORTWEIN, Mt. Catholic Conference, stated that it seems that the removal of Section 4 from present law will cause further discrimination to the housing problems already confronted by the poor and the elderly. The MCC urged a "no" vote on HB 400. He submitted written testimony. (Exhibit N).

MARY GIBSON, President, Montana Division, American Association of University Women, opposed the legislation and submitted written testimony. (See Exhibit I under HB 399). (See attached visitor's register sheets for further opponents who did not testify).

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 400: Rep. Addy asked Rep. Manuel to comment on Mr. McLean's proposed amendment. He stated it would take the Commission off the hook because they would not have to make any ruling. He further stated he is apprehensive about it because it gives the state the right to discriminate. It is possible that it could kill HB 400. Rep. Addy asked Rep. Manuel if he felt the Commission should refuse to rent to people who have children or should they prohibit it. He answered they should reject the rule and not do anything in that area. Rep. Manuel stated there are two sides to Rep. Addy's question and it is a grey area.

Rep. Manuel closed the hearing on HB 400.

HOUSE BILL NO. 495: Rep. Corne', District No. 77, stated HB 495 deals with custodial interference. He stated there is a need to expand the definition of custodial interference in the law to reflect changes in custody relationships between parents, both before and after a divorce. The charge of custodial interference cannot be made against a parent who has joint custody and then kidnaps the child. He proposed amendments to HB 495. (Exhibit A).

PROPONENTS: KELLY M. HOGAN, Attorney from Bozeman, stated it is a crime in the state of Montana to break into somebody's home and steal their goods, it is called burglary. It is a crime to help yourself to your partners joint funds but in the State of Montana, there is a loophole large enough for a child to disappear through. Many states have made it a crime to steal a child from the other parent. He pointed out that this is a necessary bill and if it is not passed, this situation of custodial interference will continue. If just one family can be saved from this terrible situation of a child being stolen and save the child from the fear, then, the legislature has accomplished much.

CYNTHIA PALMER, Bozeman, stated that presently, the law enforcement's hands are tied from helping a parent whose child has been stolen by the other parent. The Missing Children's Organization has requested that Ms. Palmer help on a local level in making changes in the law to protect children. She stressed this legislation be passed.

LINDA MCNEIL, Attorney, Bozeman, specifically addressed the proposed (c) in the amendment; joint custody. Currently, joint custody is a presumption in the State of Montana. She stated we must keep up with the changes in the law regarding custody. She urged support for HB 495 and the amendments.

OPPONENTS: MARCIA DIAS, stated she would like to see HB 495 killed. The reason for this is that the bill deals with two different subjects: 1) Taking the child out of the state; 2) Interference. Other bills have addressed this subject. She stated this bill appears to be unconstitutional because it creates absolute liability. It eliminates the requirement that intent must be proved. She further explained there are no circumstances constituting an exception or non-violation. The statute does not give courts any discretion. She submitted written testimony. (Exhibit B).

REBECCA C. ATKINS, East Helena, submitted written testimony (Exhibit C) and stated that HB 495 is an addendum to HB 284. She agreed there are many divorced parents who refuse visitation because of animosity towards each other, but this bill is too extreme and should not be passed.

CELESTE HOLLINGSWORTH, Helena, opposed the legislation because of the emotional trauma the children will face if the custodial parent is fined and imprisoned and because this legislation is wasting the taxpayer's money, especially when there are no penalties for late child support payments. She submitted written testimony. (Exhibit D).

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 495: Rep. Rapp-Svrcek asked Ms. McNeil to address Ms. Diaz's concerns in regard to an intoxicated or dangerous parent coming to pick up the children for visitation. She stated there seems to be confusion in regard to the civil processes for custody visitation with the criminal custodial interference. Ms. McNeil suggested that an order for supervised visitation should be obtained.

Rep. Corne', in closing, stated this bill addresses a serious void and he closed the hearing on HB 495.

HOUSE BILL NO. 672: Rep. Whalen, District No. 93, sponsor, stated this bill requires an insurer of a defendant to be joined as a defendant if a claim is or may be covered by the insurer and that at the time of trial the jury shall be informed of the amount of insurance coverage that the defendant has. Under the present system, when a plaintiff is injured in an accident and pursues the case, he is the one that sits at the counsel table, but his insurance company hires his attorney by contract and pays his attorney, controls his defense and the insurance company, on behalf of the insured, does the investigation. The net effect of the present status is that there is unmeaningful recoveries or no recoveries for injured plaintiffs. He stated there is an injustice in the system that this bill is designed to take care of.

PROPONENTS: ERIC THUESEN, Montana Trial Lawyers, supported the bill because the jury is very interested in knowing if there is insurance in a case. Many cases have to have retrials because the jury does not know the insurance status of the defendant and if the insurance company was named as a real party interest, the concern of the jury would be cleared up once and for all.

OPPONENTS: JACQUELINE N. TERRELL, American Insurance Association, urged a do not pass on this bill. The Montana Supreme Court has consistently ruled that introduction of evidence regarding the defendant's insurance is prejudicial. The jury's function is to determine the amount of damages in direct relation to the liability of the tort feasor.

KATHY IRIGOIN, State Auditor's office, went on record in opposition to this legislation.

ROGER MCGLENN, Independent Insurance Agents Association of Montana, stated this bill would send a negative signal to the insurance product supplier, the insurance companies. It would also reduce insurance loss predictability in the State of Montana. He pointed out that insurance companies do not pay claims with insurance company money, they pay claims

with insurance consumer money. He strongly urged a do not pass on this bill.

BONNIE TIPPY, Alliance American Insurers, went on record as being in very strong opposition of this bill.

RANDY BISHOP, Attorney, Billings, stated he was speaking on behalf of the Montana Association of Defense Counsel, and hoped HB 672 would be rejected.

SUE WEINGARTNER, Montana Association of Defense Counsel, Helena, speaking on behalf of Montana Liability Coalition, stated they strongly oppose the bill.

TOM KEEGAN, Attorney, Helena, Member of the Trial Lawyers Association, opposed this bill. The Supreme Court has said the introduction of insurance has no business in the courtroom in front of the jury.

There were no further opponents and no questions from the committee.

Rep. Whalen closed the hearing on HB 672 by stating this would not be a defense lawyer relief act.

HOUSE BILL NO. 567: Rep. Ramirez, District No. 87, sponsor, stated this bill is very important in regard to tort reform. The bill provides that in an action arising from bodily injury or death, plaintiff's reimbursement from a collateral source is admissible as evidence unless the source of the reimbursement has a subrogation right under state or federal law. He pointed out there are jury verdicts that are either excessive or do not make sense sometimes because they are trying a play, a fantasy. They are not trying the true facts in the case with respect to damages because of the collateral source rule. It simply says, those collateral sources would be given to the jury and the jury would then be required to make a reduction unless there is a statutory subrogation right. They must have a system where society pays once and only once for these damages.

PROPONENTS: GERALD J. NEELEY. Montana Medical Association, Billings, stated in Montana, the collateral source rule provides "that a payment to (an injured victim) from a source wholly independent of and not in behalf of the wrongdoer, cannot inure to the benefit of the wrongdoer to lessen the damages recoverable from him, and the evidence of such payment is inadmissible. Goggans vs. Winkley, 159 Mont. 85, 92, 485 P.2d 594, 598 (1972). The rule is predicated upon the general notion that the wrongdoer should not benefit because a victim has been prudent enough to buy his/her own insurance or because if he/she is fortunate

enough to have friends or relatives who are willing to provide valuable services without pay during a time of need. The rule is now under attack. The general argument advanced is that the rule allows the victim to be paid twice for damages such as medical expenses covered by insurance and thus, provides the injured party with a "windfall". He further stated that the collateral source rule, at least, provides the victim with a partial set off for his or her litigation costs. Abolishing the rule would only create a "windfall" for insurance companies that have received premiums, but will be able to escape risks they have insured for. The collateral source rule should be modified and not eliminated. He submitted written testimony and amendments to this bill. (Exhibit A). He also submitted a handout titled, Actuarial Analysis of American Medical Association Tort Reform Proposals, dated September, 1985. (Exhibit B). He stated the Montana Liability Coalition is in strong support of the legislation.

CONNIE CLARK, Vice-Chairman, Montana Forward Coalition, stated there is a need for a modification or elimination of the collateral source rule. This is a positive step towards correcting a flaw in the legal system and it should help improve the business climate in the State of Montana. She urged support for the bill.

KAY FOSTER, Billings Area Chamber of Commerce, pointed out that it is the concern of the Chamber that the collateral source rule does drive up the cost of insurance for all Montanans and can lead to dual recovery for the same injury. She submitted written testimony. (Exhibit C).

RALPH YAEGER, Department of Commerce, spoke in behalf of the Governor's Council and stated the Council believed this modification would allow judges and juries to make informed decisions regarding the reimbursement of providers of prior or future compensation. They believe HB 567 will help to eliminate many of the problems associated with the collateral source rule.

OPPONENTS: ERIC THUESEN, Trial Lawyers Association, stated the Trial Lawyers are against double recoveries or windfall for any plaintiff in any lawsuit. He pointed out they are for fair compensation to the victim, decided by a jury of their peers. They do oppose this legislation. Victims are not receiving windfalls. 99% of the cases of victims that use the judicial system, by no means, receives a windfall or double recovery. In 99% of the cases, the victim is never fully compensated for all his losses. He gave the example in chart form of a $100,000.00 verdict of lawful damages. Litigation costs are not part of the recovery. Under current law, if the verdict was $100,000.00, litigation

costs might cost $40,000.00, and if the person was prudent and had insurance to cover $20,000.00, his net recovery would be about $80,000.00. Under the proposed bill the man would receive about $60,000.00. This bill bogs people down in collateral source and victimizes the victim.

TOM KEEGAN, Attorney, Helena, pointed out there is no reason for this bill and it is wrong. He strongly opposed the legislation.

REP. WHALEN explained he has never seen a case where an injured plaintiff has been made whole by the present system. If the collateral source rule is taken away, it will make it that much more difficult for an injured plaintiff to be made whole. He opposed the bill.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 567: Rep. Addy said as a compromise, how about if they deduct from the award all of the benefits received and then add back in all the premiums paid. He asked Rep. Ramirez to comment on that. He stated you can look at how much of the premiums you want to put back in which he would leave at the judgement of the committee. He said he started with one year but five years or more could be added in. Rep. Mercer said he was concerned about people who want to sell insurance and people who want to buy insurance in the area of full compensation. He asked Rep. Ramirez why the rule should not be that an insurance policy could address this issue, such as, it could be treated as a collateral source. Rep. Ramirez stated it is a matter of public policy. Rep. Mercer asked if there would be any market for litigation insurance and Rep. Ramirez said that you can insure for litigation costs. Rep. Mercer said people are not recovering 100% because of the litigation costs. That is a separate issue, Rep. Ramirez stated.

Rep. Ramirez closed the hearing on HB 567 stating that he has confidence in the jury system and as long as we have the jury system, the facts must be given to them.

ADJOURNMENT: There being no further business to come before the committee, the hearing was adjourned at 12:46 p.m.

Earl Lory

EARL LORY, Chairman

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 16, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)		✓	✓
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)			
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

CS-30

EXHIBIT 4
DATE 2-11-87
HB 393

HB 393
Introduction - Representative Lory

In 1983 the Legislature amended the Montana Human Rights Act and Governmental Code of Fair Practices to allow cases to be removed from the administrative process to district courts through the use of a procedure known as a "right to sue letter." House Bill 393 corrects problems which have arisen in the interpretation of the statute and clarifies the right to sue procedures in light of a recent Montana Supreme Court decision. It also eliminates some unfair results, especially when a party who has failed to cooperate in the Commission investigation requests removal to avoid the issuance of an adverse ruling and when the Commission has invested substantial effort in preparing the case for hearing and a party requests removal on the eve of hearing.

In addition to correcting these problems, the bill would permit the Commission staff to dismiss cases on its own motion, so that the resources of the Commission are not utilized on frivolous cases.

Anne MacIntyre of the Commission staff is with me today to discuss the specifics of the bill and answer any questions you may have.

DR0002

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2-11-87
#393

Testimony - Anne L. MacIntyre,

Administrator, Human Rights Division

In Support of HB 393

The staff of the Human Rights Commission has a statutory mandate to investigate and conciliate cases filed with it. Therefore, there is a strong emphasis on the mediation and conciliation aspects of the process. In fact, the Commission is able to dismiss or settle a majority of the cases filed without hearing or litigation.

By way of background, when a case is filed with the Human Rights Commission it is assigned to an investigator for investigation and mediation. If the complaint cannot be resolved informally, a "finding" is issued by the investigator. If there is cause to believe discrimination exists and the case is not settled it proceeds through the conciliation process. If no cause is found, informal appeal may be had. All cases may then proceed through to administrative hearing, before the Commission and, if necessary, a judicial review proceeding.

As Representative Lory has stated the Montana Human Rights Act and Governmental Code of Fair Practices were amended to establish a procedure whereby cases could be removed from the administrative process. One reason for the 1983 amendment was a backlog in cases awaiting administrative hearing. That backlog no longer exists.

The Commission interpreted the statute to reflect its understanding of legislative intent and permitted removal of cases to district court when three conditions existed:

1. 180 days had elapsed since the complaint was filed.

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2. The Commission was unable to hold a contested case proceeding within 12 months.

3. The efforts of the division to settle the case after informal investigation had been unsuccessful.

In October of 1986, in University of Montana Foundation v. Human Rights Commission, the Montana Supreme Court determined that the Commission's interpretation of the statute was incorrect and held that the legislature granted the agency a total of 12 months within which to complete the administrative process when a party has requested removal.

House Bill 393 does not reverse the Supreme Court ruling. Rather, the Commission merely seeks to refine the procedures governing removal and establish some statutory exceptions which would permit the Commission to deny a request for removal, even when the time periods contained in the statute have passed.

If this bill is enacted, after a case has been pending for 12 months either party still has the right to remove the case. If a party fails to cooperate, then attempts to remove the case to avoid the issuance of a finding, the Commission could retain jurisdiction over the case. Likewise, if a subpoena enforcement action is necessary to complete the investigation, the Commission could retain the case. The average length of a subpoena enforcement action is about five months, leaving the Commission and its staff insufficient time to complete the investigation and conciliation of the case, much less the contested case hearing.

The bill also expressly provides that a party could waive the right to request removal. In addition, if the staff has certified the case for hearing and 30 days have elapsed, parties could no longer remove the

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case. This not only saves the parties preparation time, it also saves valuable resources in the time and effort expended by state employees.

If the case is one of first impression, it could likewise be retained. The parties would benefit from the expertise of the Commission and its staff in its area of specialization.

Finally, if a finding of reasonable cause is issued and the complainant is not represented by counsel, the Commission could process the case administratively. This allows unrepresented parties to take advantage of the administrative procedures without the need to hire counsel.

New subsection (3) of the statute as amended would assist the Commission staff to maintain control of its caseload by issuing right to sue letters in cases when the Commission does not have jurisdiction or where there is no cause to believe discrimination occurred. It also allows the Commission staff to issue a right to sue letter if the complainant fails to keep the Commission staff informed of its whereabouts or otherwise fails to cooperate. These procedures are modeled in part upon EEOC procedures.

This is a means of dealing with cases which lack merit or cases wherein the Commission lacks jurisdiction. It will reduce the costs of processing these claims and reduce the financial burden upon the employers to defend these claims.

The bill provides for decisions to deny requests for removal to district court or to dismiss a complaint to be made by the Commission staff with appeal to the full Commission and opportunity for judicial review.

EXHIBIT C
DATE 2-11-87
HB # 393

LAW OFFICES
REYNOLDS & MOTL
405 NORTH LAST CHANCE GULCH
HELENA, MONTANA 59601
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JAMES P. REYNOLDS
JONATHAN R. MOTL
DAVID K. W. WILSON, JR.

FREDERICK F. SHERWOOD,
OF COUNSEL

House Judiciary Committee
50th Legislature
February 11, 1987

Re: HB 393

Mr. Chairman and Members of the Committee:

My name is Frederick Sherwood. I am an attorney who has and does represent clients, both charging parties and respondents, before the Human Rights Commission. I also served as staff counsel for the Commission from 1978 through 1982. I would like to express my support for HB 393.

I believe that the bill addresses some weak spots in the present system of transition between the Commission and district courts when such a transition is triggered by the issuance of a "right to sue" letter. I particularly support the addition of new subsection (2)(a) to §§ 49-2-509 and 49-3-312. This new language would enable the Commission staff to refuse to issue a "right to sue" letter if the requesting party was uncooperative in the investigation.

A client of mine filed complaints with the Commission in January of 1984. The respondent disputed the Commission's jurisdiction and for a long time refused to supply information. Finally, when the commission staff was about to issue its findings, the respondent prevented them by demanding that the right to sue letter then be issued. The courts held that the reason for the delay in the investigation was irrelevant under existing law, and that the Commission had lost jurisdiction solely because of time limitations. The result was that my client's case was tied up for over a year and a half, with no tangible result.

The other part of HB 393 which would be especially useful is proposed new subsection (2)(c) of §§ 49-2-509 and 49-3-312, which would prohibit transferring a case to court later than 30 days after there is notice that a formal Commission hearing will occur. Either party may remove a case to district court in preference to a Commission hearing. Currently, however, such a removal can take place in theory right up to the day of the hearing itself. In practice, I have seen requests for "right to sue" letters as late as a couple weeks before the administrative hearing is scheduled. What happens then is that the parties must

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start all over again preparing for a court trial, likely duplicating much work that has already been done at the administrative level. There is no reason why a party should not be required to choose his forum earlier.

I am less enthusiastic about proposed new subsection (2)(d) of §§ 49-2-509 and 49-3-312, which would allow the Commission staff to refuse to issue a right to sue letter in matters of "first impression." I understand the rationale for this proposal, but I think there is too much of a chance of additional argument or litigation over the tangential issue of what is or is not a case of "first impression." With that caveat, I ask that HB 393 do pass.

Respectfully submitted,

Frederick F. Sherwood

Frederick F. Sherwood

State of Montana

33 South Last Chance Gulch
Helena, Montana 59620-0601
(406) 444-6576

A
2-11-87
#399

Board of Public Education

Claudette Morton
Executive Secretary

TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE
ON FEBRUARY 11, 1987
IN SUPPORT OF HB399 - REQUIRING LEGISLATIVE APPROVAL
OF HUMAN RIGHTS COMMISSION RULES ON
SEX DISCRIMINATION IN EDUCATION

By Claudette Morton, Executive Secretary
Board of Public Education

The Board of Public Education supports HB399, but we do not want our support of this bill to be misinterpreted. We definitely support equity and we believe the Human Rights Commission fulfills a very real need in the State of Montana. However, the Board of Public Education is constitutionally responsible for setting policy for the public schools, kindergarten through twelfth grade, of Montana. One of the major forums for school people, in which policy is set and distributed, is the Montana School Accreditation Standards. Public school boards and administrators have come to rely on these standards as their base for determining that they are meeting Montana rules. The Board of Public Education has been concerned with the issue of equity for some time now. (See Attachment/Handout) While it is not a very long standard it is quite comprehensive and addresses the area of sex as well as race, marital status, national origin or handicapping condition. It also speaks to the fact that this standard applies to programs, facilities, textbooks, curriculum, counseling, library services and extra-curricular activities. The standard became effective July 1, 1986. The Office of Public Instruction, in its role of implementing Board policy, has not only been working on compliance of this accreditation standard, as well as all the others, but has been providing technical assistance to school districts which may have problems understanding how to comply. The Board of Public Education put their equity standard in place over a year ago.

EXHIBIT

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We were, therefore, surprised that the Human Rights Commission decided to adopt rules governing sex equity in education this past year. The Board was somewhat dismayed and disappointed to find that the Human Rights Commission had decided to develop these rules without any communication with the state board, whose primary responsibility is public education. The Board feels that their accreditation standard 109 addressed the issues covered by these proposed rules.

There is another issue to be considered by the House Judiciary Committee. The 49th session of the Legislature enacted a law (20-2-115 MCA) which requires the Board of Public Education to develop a fiscal note to determine the financial impact of rules on school districts and further limits the Board's authority by stating that "if the financial impact of the proposed rule...is found by the Board to be substantial, the Board may not proceed to rulemaking and shall request the next legislature to fund implementation of the proposed rule." It is difficult to say whether the Human Rights Commission's more detailed rules will have a "significant impact on the schools" but it would seem to be a somewhat inequitable treatment of appointed boards if significant rules which impact K-12 education can be adopted by one body and the body whose primary responsibility is education has to live in a more restrictive rulemaking manner. Since we are hearing rules dealing with equity I bring this to the Committee also as an issue of equity.

In conclusion, the Board of Public Education supports HB399 because it feels that the proposed rules on Sex Equity in Education of the Human Rights Commission are not needed. The proposed rules, or other rules they may develop in this area, are not needed for public education because there is currently an administrative rule which covers this topic in place. We appreciate the communication we have recently had from the Human Rights Commission and would welcome the opportunity to work with them on this or other public education issues.

EXHIBIT B
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ACCREDITATION

10.55.109 OPPORTUNITY AND EDUCATIONAL EQUITY A school district will not discriminate against any student on the basis of sex, race, marital status, national origin or handicapping condition in any area of accreditation. This is inclusive of programs, facilities, textbooks, curriculum, counseling, library services and extra-curricular activities. It is the purpose of the accreditation standards to guarantee equality of educational opportunity to each person regardless of sex, race, marital status, national origin or handicapping condition. (History: Sec. 20-2-121(7) MCA; IMP, Sec. 20-7-101 MCA; NEW, 1985 MAR p. 352, Eff. 4/12/85.)

SA14085

TESTIMONY OF MONTANA HIGH SCHOOL ASSOCIATION

IN OPPOSITION TO HOUSE BILL 879

EXHIBIT C
2-11-87
HB 399

MEMBERS OF THIS COMMITTEE:

My name is Ronald F. Waterman. I appear today on behalf of the Montana High School Association in opposition to House Bill 879. The historical record of the Montana High School Association in the area of sex equality in extracurricular activities will substantiate the fact our opposition to this bill does not reflect opposition to the principle that discrimination should not exist within education.

The programs of the Montana High School Association have been operated without regard to sex. The Association is proud of its record in sponsoring women's athletics as compared to the rest of the nation. Women champions were first recognized in 1935 in the sports of golf and tennis in Montana. Today there are seven sports in which the Association sponsors both boys and girls teams; two additional sports have no sex-related criteria for participation. One sport is operated exclusively for women. Thus today in Montana, women have access to ten sports and men to nine.

The two major team sports for women, track and basketball, were initiated in 1969 and 1972 respectively. We point out that the initiation of these sports resulted from interest expressed by schools and women themselves and predated any legislative or judicial mandate requiring that action. The Association was ahead of most of the other states of the nation at the time of sanctioning these sports and remains today in that posture. In the slightly more than 10 years of the existence of these sports, Montana has produced at least a half dozen national and world class women track athletes. They include Julie Brown, Billings; Pam Spencer, Great Falls; Lorna Griffin, Corvallis; Mary Osborn, Billings; and Lexie Miller, Kalispell. That list would also include Shannon Green from Big Sandy were it not for her unfortunate death in an automobile accident. By comparison the men have produced perhaps two world class track athletes. (Doug Brown and Larry Questad). In basketball, the number of college scholarships going to women outnumber those to men by almost four to one. These discrepancies do not result from the fact Montana women are relatively superior natural athletes than are the men, but rather circumstances

Montana's relative lead over the rest of the nation in womens' athletics.

Exhibit 2

The Association opposes this bill not because it contests the principle of equal opportunities in extracurricular activities but rather because this bill represents an unnecessary change in the fundamental nature of sports in Montana. Our specific objections are as follows:

1. The act jeopardizes the continued existence and viability of the Montana High School Association. This jeopardy arises because the act defines athletics and recreational activities as "education" in the constitutional sense. As a constitutional activity it becomes very questionable whether a private voluntary association such as the Montana High School Association can continue to regulate these activities at all in Montana. We believe OPI may be required by a Court, at first opportunity, to assume control of these activities.

2. The act will alter the basic nature of extracurricular activities in Montana. By passing this act, the legislature will have made extracurricular activities a constitutional right. This drastically alters the basic law in this area which heretofore has always held that such activities were a "privilege" and not a "right". That distinction has been essential to extracurricular activities as we know it. For example:

(a) Presently the Montana High School Association requires that a student achieve a certain academic standard before he or she will be allowed to participate in extracurricular activities. By elevating these activities to a "right", participation cannot be contingent on such a requirement. Under this act, the right to participate in extracurricular activities is co-equal with the other identified traditional areas of education such as reading and math. Participation in one could not be predicated on adequate performance in another.

(b) Presently a coach or sponsor can establish rules which must be followed in order for a student to be accorded the privilege of participation. Since such participation will now be a "right" it is questionable whether such rules are viable.

(c) Since extracurricular activities, and these include speech, drama and music, will be a "right" under this act, it is then arguable that schools must provide everyone with the opportunity to participate. At the very minimum a school will have to establish objective standards by which a team will be

chosen and any person not selected for that team would have certain due process rights including a right to a hearing to contest why he or she was excluded.

All of the above effects arise naturally from the simple fact this bill chooses to accord extracurricular activities the same constitutional status as the traditional components of education. All present rules of both the Association and the individual schools are premised directly upon the fact that extracurricular activities have heretofore been classified as a privilege. Arguably, none of these rules will withstand the basic changes made by this legislation. The effect will be injurious for both extracurricular activities and for education itself.

3. This act seriously jeopardizes pending litigation. There is presently filed in federal court a class action suit by three named Plaintiffs against three schools, this Association, and the Office of Public Instruction. The suit is being prosecuted by the Denver chapter of the American Civil Liberties Union and will be decided by a Federal Judge from Idaho. The ACLU is frank to admit that Montana is being made a test case for the nation. The ACLU seeks to revolutionize sports as it exists today and the suit includes a sizeable request for money damages. The objectives of that suit are to:

(a) Have the court declare that discrimination in Montana is pervasive and injurious to women;

(b) Have the court declare that sports is a fundamental right and not merely a privilege; and

(c) Have the court declare that the Office of Public Instruction has the duty to assume direct responsibility to regulate athletics just as it does education.

Defendants in this suit have denied all of the above and until this legislation was proposed, the Association was of the opinion it would prevail since the arguments presented were unsupported by any legal precedent. If passed, this act would alter the foregoing position and substasntially assure a judgment favoring Plaintiffs on all of the relief sought.

4. This act deprives the Association of the flexibility it needs to correct existing effects of past discrimination. Our rules presently contain provisions that discriminate in favor of women. For example, we provide

for exclusively women drill teams which are a popular activity in many schools. Because up to now extracurricular activities have been a privilege and not a right, we have been confident the Association could withstand an attack by a male demanding to join such a team. Under this act this activity becomes a right and schools will be required to include males. In sports, up until recently, the Association had equality in sports opportunities, in the legal sense, because in every sport there was either a team for both boys and girls or the team was open to either sex. This procedure is legally permissible. However, actual participation in some contact sports demonstrate that equality in the legal sense is not always fairness. In practice very few women have any interest in participating in heavy contact sports. Therefore, womens' volleyball was sanctioned last winter by the Association. This sport is unique in that there is no corresponding mens' team. It is the only sport in Montana in which only one sex has access. Without this act we are confident the Association can defend that status. With the passage of this act, any offered defense would be doubtful.

5. This act subjects the s ols of Montana to the burden of complying with still another perspective on exactly what constitutes sex discrimination. There is no corresponding benefit to either the school or to women. Already women have remedies under the Federal Constitution, the State Constitution, the Human Rights Act, Section 1983 of the Federal Codes and Title IX of the Federal Codes. In the Association's experience, no two opinions are alike as to what is and is not unlawful discrimination. This act will not enjoy exclusive jurisdiction in this area; it will make no definitive statement as to what is and is not permissible. It will only subject the schools to still one more opinion as to what ought to be done and how fast it should be accomplished.

6. Finally, consideration should be given to the provision of the act creating a private legal remedy favoring all parties who believe they have been discriminated against. The threat of suit may deter action to correct inequities since such efforts may become evidence of past discrimination. Moreover, the likelihood of a multiplicity of litigation is substantial. One state which recently permitted extracurricular decisions to be challenged by administrative and court review experienced an increase in suits from five suits to 273 suits in the first year after the change occurred. A similar increase in litigation could be predicted should this bill pass.

MONTANA SCHOOL BOARDS ASSOCIATION

501 North Sanders
Helena, Montana 59601
Telephone: 406/442-2180
Wayne G. Buchanan, Executive Director

2-11-87
#399

TESTIMONY OF CHIP ERDMANN
HB 879

This bill prohibits sex discrimination against students in Montana's public schools. It specifically refers to counseling and guidance services; recreational and athletic activities; course offerings and textbooks. All of these areas are currently covered by Title IX on the federal level (which the bill was patterned after) and the Montana Human Rights Act, and in part, the Governmental Code of Fair Practices.

WHAT IS THE STATED NEED FOR THIS ACT?

The proponents claim that the federal government is withdrawing its enforcement of Title IX and that this act is needed to fill the vacuum. They also claim that if this act is adopted the federal government will stay out of Montana in this area.

Our research has shown these concerns to be unfounded. The administrator of the Office of Civil Rights, which enforces Title IX in Montana informed me that:

1) The Office of Civil Rights was not decreasing their level of Title IX enforcement in Montana.
2) Regardless if this act passes, they are under a statutory mandate to investigate and take action on all complaints filed with them. This bill would have no effect on their enforcement efforts in Montana.

IS THIS ACT NECESSARY IN MONTANA?

Currently Montana has two statutes which deal with discrimination in education. Section 49-2-307 in the Human Rights Act and Section 49-3-203 in the Governmental Code of Fair Practices. S 49-2-307 is a comprehensive statute dealing with all types of discrimination in education, with enforcement by and through the Human Rights Commission.

Attached is a summary of all state laws dealing with discrimination in education. There are 7 states that have comprehensive acts which are enforced by specific agencies. The remaining states have statutory prohibitions against discrimination, but with no enforcement agency.

EXHIBIT 2

Of the 7 states that have detailed statutes, two general groups become clear. Those states that have adopted acts specifically dealing with sex discrimination in education, with enforcement in the state education office. (Washington, Alaska, Nebraska) These states do not have a specific statute dealing with discrimination in their Human Rights Law. The other four states have decided to address this area through their Human Rights Commission (Montana, Idaho, South Dakota and Pennsylvania)

The point is that everything HB 879 provides is already covered by Montana law, although not in the same detail. When the Montana Legislature adopted our Human Rights Act in 1974, they made a policy decision that discrimination would be handled in one central agency, rather than piece meal. Passage of this bill would reverse that policy decision and erode the Human Rights Commission's jurisdiction in this area. If this is passed what special interest group will come in next for their own act - the elderly, the handicapped?

WHAT WILL BE THE EFFECT OF
TWO STATE ENFORCEMENT AGENCIES

If this bill passes, both OPI and the Human Rights Commissions will have administrative authority in the area of sex discrimination in education. This will lead to two separate bodies of administrative law developing in the same area in Montana. It will lead to "forum shopping." A person who alleges a complaint in this area can file with OPI, and if they are not satisfied, can then file with the Human Rights Commission and then with the Office of Civil Rights.

This will cause needless expense to both the state and the districts as the same issues are relitigated over and over again.

WHAT WILL BE THE EFFECT
ON THE DISTRICTS

By raising athletics and extracurricular events to be included in the "educational opportunities" guaranteed by the Montana Constitution, several problems are created for the school districts. If participation in athletics is a constitutional guarantee, can the school drop a sport due to financial reasons? It may not be able to under this act, and it certainly gives someone the right to challenge such an action by a school board.

The proponents claim this act will not cost the districts any money. A careful reading of this bill clearly demonstrates that the bill will have a major financial impact on many districts.

Personnel will have to be hired, or diverted from other areas, to ensure compliance. The athletics section (page 4, line 4-25) plainly states there will be no disparity based on sex for equipment and supplies, etc. That will require an expenditure of funds. The facilities must be comparable - remodeling or construction will be required in many schools. Further, under the civil action section, a court could order a school district to construct or remodel.

PRIVATE SCHOOL IMPACT

Another consideration to look at is the impact on private schools. By raising athletics and extracurricular events to a constitutionaly guaranteed "educational opportunity" private schools will be affected. Although the bill only addresses public schools by name, the Constitution applies to everyone, and this could force private schools under more state jurisdiction than this legislature has envisioned.

CIVIL RELIEF SECTION

Section 7 of the bill would create a private right of action for an individual to come in and sue a school district for money damages and equitable relief. This is an extention of Title IX, which does not provide for a private right of action. If a school district is alleged to have discriminated even if they are working to remedy the situation, they will be liable for civil damages.

The equitable relief provision also causes us some concer Take the area of textbooks - the manufacturers of textbook series are aware of the sex bias issue and new series generall do not have problems in that area. As old series of textbooks wear out or are outdated schools order the new series. Eventually there will be no sex-bias text books in Montana schools. Under this section an individual could bring a lawsuit alleging that various textbooks series used by a district were sex-biased. If the court agreed it could order the district to immediately replace these series. A series could easily cost between $60,000 to $70,000.

The proponents may claim this will not happen under the act. The point is that it could, and if it happened the district could be in real financial trouble.

SUMMARY

School districts view this bill as being unnecessary. The Human Rights Commission already has the jurisdiction and the expertise to enforce this area. The bill would take away local control in athletics and other extracurricular events. While the cost impact is impossible to calculate, it would be significant. We urge a do not pass on HB-879.

MTSBA LEGISLATIVE HOTLINE
Montana School Boards Association

DISTRICT CLERKS: PLEASE DUPLICATE THIS FOR ALL YOUR BOARD MEMBERS AND ADMINISTRATORS AND GET IT INTO THEIR HANDS AS SOON AS YOU CAN.

C
H.B. 879 March 8, 1983
#399

Special Mailing To Board Chairmen and Superintendents

LEGISLATIVE ALERT - HB 879

HB 879, the bill which deals with sex discrimination in education will be heard in the Senate Education Committee on Monday, March 14, at 1:00. The impact of this bill on school districts in Montana was reviewed in the last issue of the Hotline.

The proponents of this bill claim that similar bills have passed in other states and Montana should take a leadership position by adopting HB 879. Montana currently holds a leadership position in this area. Our statutes on discrimination in education, found in the Human Rights Act, are among the fourth most stringent in the nation. Passage of HB 879 would merely be redundant. In addition, the identical provisions are found in Title IX on the federal level.

Proponents of this bill have assured us that passage of this bill will "get the Feds out of sex equity in Montana." They have stated further that there are current plans to decrease enforcement of Title IX, the federal act which prohibits sex discrimination in schools. We contacted Dr. Gilbert Roman, district director of the Office of Civil Rights of the Department of Education in Denver. Dr. Roman has assured us most emphatically that both assumptions are false. Cutbacks in Title IX enforcement are not being considered and O.C.R. will continue to investigate and prosecute actions filed under Title IX regardless of any state law on the subject. This, as we stated in the last Hotline, would put school districts in the position of having to win in both forums in order to prevent forced compliance with the suit.

The bill would require OPI to create an expensive enforcement bureau to ensure schools were in compliance with the Act. If OPI found a school had discriminated in such areas as counseling and guidance services, textbooks and instructional material, or recreational and athletic activities, the end result could be the elimination of state funding to the district until the situation was corrected. Some districts may be forced to hire compliance personnel and to remodel or construct additional facilities.

We have been informed by attorneys for the Montana High School Association HB 879 would eliminate its role as regulating extracurricular events. The bill defines athletic events as being an educational right under the Montana Constitution. Once defined as an 'educational right', the supervision must be placed within OPI. Athletics would also become a constitutional right of the students and school boards may lose the discretion to offer various athletic events, regardless of the financial condition of the district.

Equality in education is a goal we all subscribe to. Discrimination, whether it be on the basis of sex, race, color, social origin or political or religious ideas must be eliminated. We feel, however, that there are sufficient laws in existence which address the problem. A mere restatement of the law is a needless act. The only thing this bill would accomplish is to saddle OPI with an expensive enforcement program; cost the districts a substantial amount of money to hire compliance personnel and bring facilities into compliance; eliminate the Montana High School Association and replace it with OPI regulation.

EXHIBIT 2

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2-11-87
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OFFICE OF PUBLIC INSTRUCTION

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

Ed Argenbright
Superintendent

March 14, 1983

TO: Senator Bob Brown, Chairman
Members of the Education and
Cultural Resources Committee

FROM: Judith A. Johnson
Assistant Superintendent
Department of Special Services
Telephone: 449-3693

RE: HB 879

A bill for an Act entitled: "An Act to prohibit discrimination on the basis of sex against any student in the public schools of Montana; to require the Superintendent of Public Instruction to develop rules and guidelines to eliminate sex discrimination in public school employment, in counseling and guidance services, in access to course offerings and recreational athletic activities, and in textbooks and instructional materials; and to allow the Board of Trustees of a district to appeal notification of an alleged violation; amending Section 20-3-107, MCA."

We want to make it very clear that the Office of Public Instruction strongly supports Title IX and Sex Equity.

As Title IX and Sex Equity coordinator for the Office of Public Instruction, as well as having National Origin and Handicapped programs in my Department, I want to inform you of the stance and philosophy of the Office of Public Instruction. Under the constitution and several federal and state laws, it is our responsibility to guarantee equal educational opportunity to all students in the state of Montana. Two years ago, when Superintendent Argenbright was elected, a conscious effort was launched to do this. The theme equal opportunity and excellence is part of every program. We believe it is our responsibility to provide assistance to school districts so that they are, in fact, also

providing equal opportunity, but doing so because it is good educational practice and economically feasible, not because of threat of loss of funds and litigation. We have not changed any laws or regulations, but what we have done is provided countless workshops and on-site assistance to school districts throughout the state so that each district has the ability and knowledge to assure their local patrons that every child, regardless of national origin, handicapping condition, race or sex, is being challenged to their full potential.

We have worked extensively with all levels of local districts, classroom teachers, counselors, administrations and school boards. We are extremely proud of the track record of the local schools and, candidly, one of the measures of success is the low incident of due process hearings, court proceedings and the lack of parental complaints filed in our office in the last two years. We feel that this is due to a change in philosophy in the Office of Public Instruction from an adversary position with districts to one of technical assistance and trust. You have, attached to my testimony, a list of formal workshops. This is only the tip of the iceberg as far as what has been done. Knowing that one must start at home, we have followed the example of the federal administration and done, by example within the Office of Public Instruction, all that we have been asking local districts to do. We have held workshops on equal opportunity and education. Superintendent Argenbright has hired according to ability, regardless of sex or handicapping conditions.

It is because of this commitment and attitude that we have some very genuine concerns about HB 879. The sponsor's statements concerning the Office for Civil Rights and the federal government are partially true. The role of the "Feds" has changed, just as ours has, in that they provide us and local districts a great deal of assistance. We have used the Office for Civil Rights as our technical assistants repeatedly in all areas from Title IX to handicapped. This does not lessen their role as compliance officers; however, it does assure us before we get into trouble that we can call them for help. Equity and equal opportunity is an attitude, a long-standing individual traditional attitude.

I can document that what we are currently doing, through examples both on the federal and state levels concerning equal opportunity, will change attitudes and because it is good sound education practice to develop kids' potential to its fullest regardless of "what" they are, not because they will get sued if they do not do it. So, I do not believe that we need to create another office for human rights or a "Human Rights Commission" for athletic and sports without first gathering some facts and data concerning the extent of problems and the impacts of the strict enforcement on Montana's sports programs.

What the Office of Public Instruction is currently doing, through workshops and technical assistance, is part and parcel of everything we are funded to do--granted 100 percent are federal funds which we mix and match and watch decrease every day. What HB 879 does is make us an adversary, as well as compliance and monitoring agent. We have currently

been reduced over $25,000 in in-state travel money alone. We are not able financially to carry out the compliance, monitoring and due process aspect of HB 879 without funding. Nor do I believe a bill with this strong commitment to sex equity, which I feel is different than our commitment to equal opportunity, should pass without just as strong a fiscal commitment by the legislature.

The sponsor of this bill is seeking immediate enforcement in Montana's school districts of this law and yet has spearheaded to cut those portions of our existing office budget needed to accomplish this goal. The fiscal note of $500,000 is not at all unreasonable if we were to begin immediate enforcement action. I do not believe that a series of enforcement actions and lawsuits would change many attitudes or impressions. It could seriously damage the progress which we are now making in Title IX and sex equity.

The Superintendent believes that this swift and complete intrusion of his office into the every day activities in sports programs could seriously damage that local control and erode what progress has been made to date. We do feel a survey of Montana schools would be valuable, and we propose to do this regardless of what happens to this bill.

We are submitting amendments to the committee seeking compliance with Title IX. This bill is not in compliance with Title IX, and it is the objective potential of catch 22 for local school districts to be in violation of either state or federal law or one or the other without a way out.

My amendments, as given to you, have been verified by both Dr. Gilbert Roman from the Office for Civil Rights and by Becky Smith, attorney for Chief State School Officers Sex Equity Resource Center. We are also submitting other amendments to clarify and strengthen the commitment.

I have also attached a letter from the Office for Civil Rights concerning these amendments which will get HB 879 into compliance.

Again, we support the concept of Title IX, sex equity and equal opportunity not only because it required constitutionality, but because it is a fair and right educational practice.

Thank you.

2-11-87 #399

49-2-306. Discrimination in financing and credit transactions. (1) It is an unlawful discriminatory practice for a financial institution, upon receiving an application for financial assistance, to permit an official or employee, during the execution of his duties, to discriminate against the applicant because of sex, marital status, race, creed, religion, age, physical or mental handicap, color, or national origin in a term, condition, or privilege relating to the obtainment or use of the institution's financial assistance, unless based on reasonable grounds.

(2) It is an unlawful discriminatory practice for a creditor to discriminate on the basis of race, color, religion, creed, national origin, age, mental or physical handicap, sex, or marital status against any person in any credit transaction which is subject to the jurisdiction of any state or federal court of record.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(5), (8).

Cross-References

State District Court jurisdiction, Title 3, ch. 5, part 3.

Municipal Court jurisdiction, 3-6-103.

Power to contract, Title 28, ch. 2, part 2.

No discrimination by certain insurers, 33-18-210.

Medical and health insurance — continuation of coverage for handicapped child, 33-22-304, 33-22-506, 33-30-1003, 33-30-1004.

Minors' power to contract, Title 41, ch. 1, part 3.

49-2-307. Discrimination in education. It is an unlawful discriminatory practice for an educational institution:

(1) to exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution because of race, creed, religion, sex, marital status, color, age, physical handicap, or national origin or because of mental handicap, unless based on reasonable grounds;

(2) to make or use a written or oral inquiry or form of application for admission that elicits or attempts to elicit information or to make or keep a record concerning the race, color, sex, marital status, age, creed, religion, physical or mental handicap, or national origin of an applicant for admission, except as permitted by regulations of the commission;

(3) to print, publish, or cause to be printed or published a catalog or other notice or advertisement indicating a limitation, specification, or discrimination based on the race, color, creed, religion, age, physical or mental handicap, sex, marital status, or national origin of an applicant for admission; or

(4) to announce or follow a policy of denial or limitation of educational opportunities of a group or its members, through a quota or otherwise; because of race, color, sex, marital status, age, creed, religion, physical or mental handicap, or national origin.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(7).

Cross-References

Nondiscrimination in education, Art. X, sec. 7, Mont. Const.

Exemption from immunization requirements on religious grounds, 20-5-405.

49-2-308. Discrimination by the state. It is an unlawful discriminatory practice for the state or any of its political subdivisions:

of any public accommodation or housing accommodation subject to this chapter to post, in a conspicuous place on his premises or in the accommodation, a notice to be prepared or approved by the commission containing relevant information that the commission considers necessary to explain this chapter. Any person or institution subject to this section who refuses to comply with an order of the commission respecting the posting of a notice is guilty of a misdemeanor and punishable by a fine of not more than $50.

History: En. 64-314 by Sec. 12, Ch. 524, L. 1975; R.C.M. 1947, 64-314; amd. Sec. , Ch. 177, L. 1979.

49-2-203. Subpoena power. (1) The commission may subpoena witnesses, take the testimony of any person under oath, administer oaths, and, in connection therewith, require the production for examination of books, papers, or other tangible evidence relating to a matter either under investigation by the commission staff or in question before the commission. The commission may delegate the foregoing powers to a person within the staff for the purpose of investigating a complaint.

(2) Subpoenas issued pursuant to this section may be enforced as provided in 2-4-104 of the Montana Administrative Procedure Act.

History: En. 64-313 by Sec. 11, Ch. 524, L. 1975; R.C.M. 1947, 64-313.

49-2-204. Commission to adopt rules. The commission shall adopt procedural and substantive rules necessary to implement this chapter. Rulemaking procedures shall comply with the requirements of the Montana Administrative Procedure Act.

History: En. 64-315 by Sec. 13, Ch. 524, L. 1975; R.C.M. 1947, 64-315.

Cross-References

Montana Administrative Procedure Act, Title 2, ch. 4.

Part 3

Prohibited Discriminatory Practices

Part Cross-References

No discrimination based on evaluation or treatment relating to mental illness, 53-21-189.

49-2-301. Retaliation prohibited. It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

History: Ap.p. Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; Sec. 64-306, R.C.M. 1947; Ap.p. Sec. 9, Ch. 283, L. 1974; amd. Sec. 10, Ch. 524, L. 1975; Sec. 64-312, R.C.M. 1947; R.C.M. 1947, 64-306(9), 64-312(2); amd. Sec. 4, Ch. 177, L. 1979.

49-2-302. Aiding, coercing, or attempting. It is unlawful for a person, educational institution, financial institution, or governmental entity or

Exclusion of handicapped from minimum wage and overtime compensation laws, 39-3-406.
Women in employment, Title 39, ch. 7.
Veterans' and handicapped persons' public employment preference, Title 39, ch. 30.
Exemption from association with labor organization on religious grounds, 39-31-204.
Right to refuse to participate in sterilization, Title 50, ch. 5, part 5.
Right to refuse to participate in abortion, 50-20-111.

49-3-202. Employment referrals and placement services. (1) All state and local governmental agencies, including educational institutions, which provide employment referrals or placement services to public or private employers shall accept job orders on a fair practice basis. A job request indicating an intention to exclude a person because of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin shall be rejected.

(2) All state and local governmental agencies shall cooperate in programs developed by the commission for human rights for the purpose of broadening the base of job recruitment and shall further cooperate with employers and unions providing such programs.

(3) The department of labor and industry shall cooperate with the commission for human rights in encouraging and enforcing compliance by employers and labor unions with the policy of this chapter and promotion of equal employment opportunities.

History: En. 64-320 by Sec. 5, Ch. 487, L. 1975; amd. Sec. 12, Ch. 38, L. 1977; R.C.M. 1947, 64-320.

49-3-203. Educational, counseling, and training programs. All educational, counseling, and vocational guidance programs and all apprenticeship and on-the-job training programs of state and local governmental agencies or in which state and local governmental agencies participate must be open to all persons, who must be accepted on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin. Such programs must be conducted to encourage the full development of the interests, aptitudes, skills, and capacities of all students and trainees, with special attention to the problems of culturally deprived, educationally handicapped, or economically disadvantaged persons. Expansion of training opportunities under these programs must be encouraged to involve larger numbers of participants from those segments of the labor force in which the need for upgrading levels of skill is greatest.

History: En. 64-323 by Sec. 8, Ch. 487, L. 1975; amd. Sec. 14, Ch. 38, L. 1977; R.C.M. 1947, 64-323; amd. Sec. 15, Ch. 177, L. 1979.

Cross-References

No aid to sectarian schools, Art. X, sec. 6, Mont. Const.
Nondiscrimination in education, Art. X, sec. 7, Mont. Const.
Free tuition for veterans, 10-2-311 through 10-2-314.
Special education supervisor, 20-3-103.
Exemption from immunization requirements on religious grounds, 20-5-405.
Special education for exceptional children, Title 20, ch. 7, part 4.
Educational programs for gifted children, Title 20, ch. 7, part 9.
State School for the Deaf and Blind, Title 20, ch. 8.
Exemption from barber apprenticeship fees, 37-30-307.
Exemption from cosmetology examination and fees, 37-31-308.

49-3-204. Licensing. No state or local governmental agency may grant, deny, or revoke the license or charter of a person on the grounds of race.

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color, religion, creed, political ideas, sex, age, marital status, ~~physical or~~ mental handicap, or national origin. Each state or local governmental agency shall take such appropriate action in the exercise of its licensing or regulatory power as will assure equal treatment of all persons, eliminate discrimination, and enforce compliance with the policy of this chapter.

History: En. 64-321 by Sec. 6, Ch. 487, L. 1975; amd. Sec. 13, Ch. 38, L. 1977; R.C.M. 1947, 64-321; amd. Sec. 16, Ch. 177, L. 1979.

Cross-References

Restrictions on licensing of former criminal offenders, 23-4-201, 23-5-322, 23-5-422, 23-7-109, 37-1-201 through 37-1-205, 37-1-122, 87-4-141.

Professions and Occupations, Title 37.

Licensure of criminal offenders, Title 37, ch. 1, part 2.

Exemptions from licensure as physician — Christian Science practitioners and mohels, 37-3-103.

Licensing and standards for spiritual healing institutions, 50-5-104.

Special license plates for disabled veterans, handicapped persons, and ex-prisoners of war, 61-3-444 through 61-3-447, 61-3-451 through 61-3-453.

Ineligibility of handicapped for driver's license, 61-5-105.

Exceptions to fishing and hunting license requirements, Title 87, ch. 2, part 8.

49-3-205. Governmental services. (1) All services of every state or local governmental agency must be performed without discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin.

(2) No state or local facility may be used in the furtherance of any discriminatory practice, nor may a state or local governmental agency become a party to an agreement, arrangement, or plan which has the effect of sanctioning discriminatory practices.

(3) Each state or local governmental agency shall analyze all of its operations to ascertain possible instances of noncompliance with the policy of this chapter and shall initiate comprehensive programs to remedy any defect found to exist.

History: En. 64-318 by Sec. 3, Ch. 487, L. 1975; amd. Sec. 10, Ch. 38, L. 1977; R.C.M. 1947, 64-318; amd. Sec. 17, Ch. 177, L. 1979.

Cross-References

Sex discrimination — records of military discharges, 7-4-2614.

Urban renewal, 7-15-4207.

Use of hospital district facilities, 7-34-2123.

Library services for the handicapped, 22-1-103.

Health care facilities, 50-5-105.

Exemption from prenatal blood tests on religious grounds, 50-19-109.

Furnishing of medical assistance, 53-6-105.

Opportunity for religious observance in facilities for developmentally disabled, 53-20-142.

Community-based services for developmentally disabled, 53-20-212.

Opportunity for religious observance in mental health facilities, 53-21-142.

Community mental health centers, 53-21-206.

49-3-206. Distribution of governmental funds. Race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin may not be considered as limiting factors with regard to applicants' qualifications for benefits authorized by law in state or locally administered programs involving the distribution of funds; nor may state agencies provide grants, loans, or other financial assistance to public agencies, private institutions, or organizations which engage in discriminatory practices.

History: En. 64-324 by Sec. 9, Ch. 487, L. 1975; amd. Sec. 15, Ch. 38, L. 1977; R.C.M. 1947, 64-324.

Cross-References

Furnishing of medical assistance, 53-6-105.

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49-3-105. Procedure for claiming exemption. A state or local governmental agency seeking to apply any exemption from the requirements of this chapter may petition the commission for a declaratory ruling as provided in 2-4-501 of the Montana Administrative Procedure Act. If the commission finds that reasonable grounds for applying an exemption exist, it may issue a ruling exempting the petitioner from the particular provision. The burden is on the petitioner to demonstrate that an exemption should be applied. Any provision in this chapter allowing an exemption from its requirements must be strictly construed.

History: En. Sec. 4, Ch. 540, L. 1983.

49-3-106. Rulemaking authority. The commission may adopt rules necessary for the implementation of this chapter, in accordance with the Montana Administrative Procedure Act. The rules may include but are not limited to procedural rules for:

(1) filing of complaints;
(2) conducting investigations of complaints;
(3) petitioning for a declaratory ruling, as provided in 49-3-105; and
(4) conduct of hearings.

History: En. Sec. 2, Ch. 540, L. 1983.

Part 2
Duties of Governmental Agencies and Officials

49-3-201. Employment of state and local government personnel. (1) State and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin.

(2) All state and local governmental agencies shall:

(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;

(b) regularly review their personnel practices to assure compliance; and

(c) conduct continuing orientation and training programs with emphasis on human relations and fair employment practices.

(3) The department of administration shall insure that the entire examination process, including appraisal of qualifications, is free from bias.

(4) Appointing authorities shall exercise care to insure utilization of minority group persons.

(5) Compliance with 2-2-302 and 2-2-303, which prohibit nepotism in public agencies, may not be construed as a violation of this section.

History: En. 64-317 by Sec. 2, Ch. 487, L. 1975; amd. Sec. 9, Ch. 38, L. 1977; R.C.M. 1947, 64-317; amd. Sec. 14, Ch. 177, L. 1979; amd. Sec. 3, Ch. 342, L. 1985.

Compiler's Comments

1985 Amendment: Inserted (5).

Cross-References

Classified service employees — municipal commission-manager government, 7-3-4415.

Employment by county Board of Park Commissioners, 7-16-2326.

Employment of veterans, Title 10, ch. 2, part 2.

Work-study program, 20-25-707.

Equal pay for women for equivalent service, 39-3-104.

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HB 399

HUMAN RIGHTS COMMISSION

TED SCHWINDEN, GOVERNOR
1236 SIXTH AVENUE
STATE OF MONTANA
(406) 444-2884
P.O. BOX 1728
HELENA, MONTANA 59624

TESTIMONY OF MARGERY H. BROWN
In opposition to HB 399

The Commission has been entrusted with enforcing discrimination laws in Montana through the contested case process and through rulemaking authority granted by this legislature. This rulemaking authority mandates that the Commission promulgate rules under the Montana Human Rights Act. Attached as Exhibit 1 are copies of the provisions of the Montana Human Rights Act and the Governmental Code of Fair Practices which outline the individual's right to be free from sex discrimination in education in Montana and the Commission's legislative authority to promulgate rules. As testimony which follows will show, sex discrimination in education is still a problem in Montana today, despite the commendable efforts of the proponents of HB399 to solve the problem.

The Commission is responsible for enforcing anti-discrimination laws enacted by the Legislature. Thus, we are rarely in a position to support or oppose substantive legislation. In this instance, however, the Commission is compelled to oppose HB 399. Requiring approval of both houses before adoption of rules appears to us to be a distortion of the administrative process. It could open the floodgate of controversy to spill into the legislature in many areas of administrative law when safeguards have already been provided in our system of checks and balances to assure that rules accurately explain the law.

Further, in our litigious society the Commission seeks to promulgate rules to provide guidelines. It has been the Commission's experience that in providing rules, like the education equity rules, we provide guidance to deter the filing of claims. In the area of maternity leave for example, the Commission promulgated rules in 1984. Inevitably it is the employer who calls and asks, "I have a pregnant employee, are there any rules I can follow?" The Commission staff receives at least two such calls a week from employers in this state. Because there is not one thought or passage in the proposed rules on sex equity in education which the Commission could not decide on a case by case basis, the Commission hopes to avoid litigation through the promulgation of its rules. Our experience has shown that avoidance of litigation should be the result.

It is important to note that in the matter of sex discrimination, the Montana Human Rights Act provides the exclusive remedy for the vindication of individual or private rights in the State of Montana. It is a fundamental principle of law that when the legislature creates a right and provides a remedy, that remedy is exclusive. While federal

EXHIBIT

rights and grievance procedures may co-exist, the filing of federal claims does not preclude the filing of state claims.

Much attention has been directed to sex equity in Montana schools in recent years, in response to Title IX requirements, to litigation and settlement requirements, and to good faith efforts to establish accreditation standards and other guidelines requiring non-discriminatory treatment of students. The Commission has worked for more than a year -- often in co-operation with educational administrators -- to develop interpretive rules under the Montana Human Rights Act. The purpose of the rules is to provide uniform guidelines as to the requirements of Montana law protecting the right of students to be free from discrimination based on sex at every stage and in every aspect of their educations.

The Commission takes seriously the task of rulemaking and we have reviewed the rules of many other states which interpret anti-discrimination laws comparable to the Montana Human Rights Act. Our staff has a contact person in each of these states and has been in contact with individuals from the educational community in Montana. The staff has also been in contact with the office of the national project on state Title IX laws. At present, 13 states have rules patterned after Title IX.

The Commission was requested to promulgate these rules in response to several influences. In 1984 the U.S. Supreme Court decided Grove City College v. Bell. In that case the Court very narrowly interpreted the application of the federal Title IX law holding that only programs or activities which directly receive federal money are required to comply with Title IX. This decision has had a great impact on the enforcement of Title IX. Proof of federal jurisdiction under this new standard is now a threshold question in every case. The Grove City decision left an enormous gap in the enforcement of laws prohibiting discrimination on the basis of sex in education and left that gap to the states to fill.

The Commission also undertook to promulgate rules because of testimony presented at the 1983 legislative session. In 1983 House Bill 879 was introduced at the Montana legislative session. The bill would have given the Office of Public Instruction rulemaking and enforcement powers in the area of sex equity in education. The Office of Public Instruction, the Montana High School Association and Montana School Board Association lobbied against enactment of that bill. In one form or another all three groups indicated that the 1974 Human Rights Act prohibited discrimination in education and provided for enforcement through the Human Rights Commission. Copies of that testimony are attached as Exhibit 2.

Specifically, the Montana School Boards Association testified that everything in House Bill 879 was already covered under Montana law. "When the Montana legislature adopted our Human Rights Act in 1974, they made a policy decision that discrimination would be handled in one central agency, rather than piecemeal." The testimony goes on to say

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the passage of House Bill 879 would "reverse that policy decision and erode the Human Rights Commission's jurisdiction in this area." A Legislative Alert from the Montana School Boards Association dated March 8, 1983 provides, "our statutes on discrimination in education, found in the Human Rights Act, are the fourth most stringent in the nation. Passage of House Bill 879 would merely be redundant." The Montana High School Association testified that enactment of House Bill 879 would "burden the schools and force them to comply with still another perspective on exactly what constitutes sex discrimination." They testified that there was no corresponding benefit to either the school or to the women as the women already had remedies under the federal and state constitutions as well as the Human Rights Act.

In speaking of athletics and sports in the educational institutions, the Office of Public Instruction testified that it did not believe that it was necessary to create "another Office of Human Rights Commission."

In the spring of 1985 the Women's Lobbyist Fund requested that the Commission promulgate rules in the area of sex equity in education. The Commission's first step was to hold a public hearing in July, 1985 on contemplated rulemaking in this area. After considerable deliberation, the Commission decided to proceed with rulemaking at its meeting of March, 1986. At the direction of the Commission, the staff prepared a draft of the proposed rules. Early in the fall of 1986, the Commission distributed copies of the draft and elicited additional opinions from interested parties pursuant to the discretionary procedures for development of rules under the Montana Administrative Procedures Act. Revisions followed and interested parties then were sent copies of the second draft of the rules. On October 6, 1986, the Commission published notice of proposed adoption of the rules through the office of the Secretary of State and sent notice to all parties who had indicated an interest in the rules. On November 21, 1986, the Commission held a public hearing on its rules. After evaluating the comments made at that hearing, the Commission has incorporated most of the changes requested, including all suggestions of the staff of the administrative code committee.

For example, the Commission has incorporated a reasonable grounds exception into all of the rules. It decided to rewrite the definition of sex bias, eliminate the section on textbooks, and amend the language of the rule regarding extracurricular and athletic activities. The Commission clarified the rule regarding treatment of pregnant students and clarified the educational institution's responsibility for sexual harassment and intimidation of students. The Commission further clarified its rule on the use of tests that have a disparate impact based on sex as the sole factor in admissions and also provided for the distribution of financial aid and awards based upon sex under certain circumstances. All of these revisions of the proposed rules have been made in response to comments presented to the Commission by representatives of the education community.

The Human Rights Commission respectfully requests that the House Judiciary Committee recommend that HB 399 do not pass. As I have

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reported to you, we have carefully and deliberately followed the legislative mandate given to the Commission in the area of sex discrimination in education. Prohibiting the Commission from adopting these rules would not affect the underlying law, nor do we believe that that could be the Legislature's intent. The effect of the bill would be to preclude the Commission from advising the public of our construction of the law we administer. It is difficult for us to see wisdom is such action.

EXHIBIT F
DATE 2-11-87
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WITNESS STATEMENT

NAME Susan Sachsenmaier BILL NO. 399

ADDRESS P.O. Box 1099 Helena DATE 2/11/87

WHOM DO YOU REPRESENT? Women's Lobbyist Fund

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

CS-34

EXHIBIT

WOMEN'S LOBBYIST FUND

Box 1099
Helena, MT 59624
449-7917

F
2-11-87
#399

February 11, 1987

TESTIMONY ON HB 399

Mr. Chairman and members of the committee:

My name is Susan Sachsenmaier and I am speaking on behalf of the Women's Lobbyist Fund, a coalition of 39 women's organizations throughout Montana. WLF opposes House Bill 399. This bill singles out educational equity rules for legislative approval. Why have these rules in particular been chosen? The Lobbyist Fund views this bill to be an effort to obstruct further progress in educational equity.

Requiring the legislature to approve these comprehensive rules would consume precious time and money. The legislature has the right to repeal or change rules such as these. This bill is unnecessary. The Human Rights Commission (HRC) should be allowed to exercise its expertise in an area that it has demonstrated fairness and effectiveness.

The Human Rights Commission, as a state agency, is required by law to adopt rules that would implement the Human Rights Act. (49-2-204, MCA) Since July 1985, the Commission has worked to develop rules that would inform educators and administrators of their specific obligations to educational equity. A study conducted in June of 1986 by the HRC revealed that 150 of 183 schools failed in at least one area to comply with educational equity requirements. Thus, the need for more specific guidelines is readily apparent. Without such rules, schools could be charged with discrimination, but would not have state guidelines that clarify and specify the requirements of the laws. Opponents maintain that the sex equity rules duplicate laws already in place--Title IX federal law, the Montana Constitution (Article II, section 4, and Article X, section 7) and The Human Rights Act. This argument is simply not true. Title IX is a detailed federal law that is applicable only to those programs and activities receiving federal funds. The Human Rights Act and The Montana Constitution provide only general statements about what constitutes sex discrimination.

The HRC has looked at the Title IX federal law, other states' statutes, and individual case laws in creating a desirable set of rules for Montana. In addition, the Commission has held public hearings and invited public comment. The latest draft of the rules incorporates many of the legitimate suggestions offered by the public.

One other point: in 1983 the Montana School Boards Association and the Office of Public Instruction (OPI) opposed a bill that would have placed defining of and authority for enforcing the educational equity rules in the hands of OPI. What was the reason for their opposition? They contended that anti-discrimination laws belonged under the Human Rights Act and thus, under the authority of the Human Rights Commission. Hense, the Women's Lobbyist Fund asked the Commission to adopt the sex equity rules. The Office of Public Instruction has, however, clearly made efforts to see that educators are aware of sex biases and discrimination in education. Nevertheless, the education equity rules, themselves, still must be addressed.

WOMEN'S LOBBYIST FUND

Box 1099
Helena, MT 59624
449-7917

EXHIBIT F
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February 11, 1987

TESTIMONY ON HB 399

WLF has watched with great concern and interest the development of educational equity rules--rules drafted at the request of our organization. We credit the Human Rights Commission with the progress toward what we hope will be the eventual adoption of these rules. WLF sees no need to further postpone the adoption of specific rules that define basic civil rights. HB 399 aims to obstruct progress in sex equity, an area of importance to our state's young women, men and children. We urge the committee to oppose this bill. Thank-you.

-END-

G
2-11-87
#399

5855 Pinewood Lane
Missoula, Mt. 59803
Feb. 11, 1987

Testimony Opposing HB 399 and HB 400
Before the House State Administration Committee

I am Martha Onishuk, Legislative Chair of the Missoula League of Women Voters. The Montana League of Women Voters has asked me to testify on its behalf to oppose HB 399 and HB 400.

The LVWMt's opposition to these bills is based on several grounds:

1. These bills are unnecessary and redundant. The Legislature already has the power to review rules of a state agency through the Administrative Code Committee under the Administrative Procedures Act (RCM 2-4-401, et seq.).

2. There is a separation of powers in the Montana Constitution between the legislative and executive branches of government. These bills would take powers from an executive state agency and place them with the Legislature.

3. The League has strongly supported equal access to housing and education for all citizens. These bills would place further obstacles in the way of social and economic justice by delaying implementation of rules drawn up by the Human Rights Commission until the Legislature acts upon them. This is a wasteful duplication of the rule-making procedure.

4. These bills would set a bad precedent if the Legislature must approve rules of an executive department. The Legislature has enough business for a short legislative session every two years. Does this mean, in the future, all rules of all 17 state agencies will have to have Legislative approval?

The League has been following the HRC educational equality rule-making for the last three years. Evidence at these meetings and hearings and in the settlement agreement review of the Ridgeway suit have shown discrimination still exists in Montana schools.

We urge the defeat of HB399 and HB400 and encourage the HRC to adopt rules to guarantee access of all Montanans to housing and education without prejudice as required by the Montana Constitution.

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MHSA - MT High School Association
MSBA - MT School Boards Association
OPI - Office of Public Instruction

Feburary 9, 1987

My name is Nancy Deden and I'm here to testify against HB 399 ~~400~~ and try to explain to you with documentation how and why the Human Rights Commission is involved in making Equality Rules for the Schools of Montana.

I'm also going to try and show why there is opposition to these rules .

The process of having the Human Rights Commission develope rules and guidelines for our schools has been a slow and painstaking undertaking by all people involved in eliminating the discrimination which exists in our schools.

First of all the process of rule-making begin with the passage of Title IX in 1972 that all students are equally important, all students should be treated fairly, all students should have a chance to participate in educational activities based on interest and ability rather than on gender.

The beginning of Title IX in Montana was the sanctioning of girls' basketball within the school system and competitive play between schools. This first basketball season was not a FALL SEASON, it was a WINTER SEASON. Girls at that time could run CROSS COUNTRY IN THE FALL and PLAY BASKETBALL FROM OCTOBER TO THE END OF JANUARY.

Boys in Montana were not use to sharing the gym with the female athletes and the movement of basketball for girls began its process of becoming a fall sport. In your documentation of this event I have included an article from the Missoulian dated Sept. 28, 1973. It states the same problems that we have found to still be existing in Montana today; INADEQUATE FUNDING, MISERABLE PRACTICE CONDITIONS, AND NO JUNIOR VARSITY TEAMS.

One statement that really shows the conditions at that time is "THE ADMINISTRATION HAS PROVIDED FOR A JUNIOR VARSITY TEAM, THE EARLY SEASON ALLOWS THE GIRLS TO PRACTICE IN THE "BOYS GYM" INSTEAD OF ON THE CONCRETE FLOOR THEY USED LAST YEAR AND THE BUDGET HAS BEEN INCREASED FROM $250 to $1300."

Mr. McKay, then president of the western girls basketball division predicted that within 2 or 3 years girls basketball will be funded equitably with boys. He also foresaw that the early season will hurt attendance and CREATE A CONFLICT FOR SOME GIRLS BETWEEN CROSS COUNTRY AND BASKETBALL.

Now you understand a little of how we have gotten many of the problems existing in Montana. The Office of Public Instruction, The School Boards Association, The Administrators of Montana. The Montana High School Association and The State Board of Education, DID NOT enforce Title IX. Instead they made allowances for discrimination and FALL BASKETBALL FOR GIRLS WAS ONE OF THE MORE VISIBLE ALLOWANCES. Many other things occur in the classroom that are harder to pinpoint and they occur because in Montana the leaders in education and the legislature have allowed them to exist and grow. WE NOW ARE TRYING TO CORRECT THE MANY DISCRIMINATIONS THROUGH COURT CASES (RIDGEWAY) and RULE DEVELOPMENT BY THE HUMAN RIGHTS COMMISSION.

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The Legislature has had their part in this history too. Back in 1974 the legislators of Montana established an Select Committee on Inter-School Activities. This committee was to conduct 3 informational surveys:

1. Survey of Montana Inter-School Activities
2. Survey of State Inter-School Activities
3. Survey of Girls' Athletics in Montana

The study committees found the same problem that all the rest of us have found in Montana for GIRLS' IN ATHLETICS. THERE IS DISCRIMINATION.
On page 22 of this study Alternative 3: Girls' Athletics; The recommendation is for the Superintendent of Public Instruction and the Montana High School Association to actively promote Equity between boys and girls athletics.
ALSO THE RECOMMENDATION TO HAVE GIRLS AND BOYS PLAY BASKETBALL IN THE WINTER.
THEY SAW NO REASON FOR FALL BASKETBALL.

On January 30, 1975 House Joint Resolution No. 2 was passed, that interscholastic activities are an integral part of education for boys and girls.
That inequities exist in areas as salaries for coaches of girls' teams, the use of facilities for interscholastic activities by girls' teams, number of opportunities to participate for girls.

After this Resolution was passed MHSA adopted a similar one, The State Board of Education developed this philosophy and so on. But the change for girls did not happen, words were printed, but actions never took place, Title IX was never enforced, the Resolution had no power and it was now 1975 and Montana should be incompliance with the law and it was not and it is still not.

While all this was going on we parents have struggled at a local level to improve things for our daughters. As groups we have applied pressure to our local administrators for change and improvements. The first Title IX was filed in Whitefish, MT, which started volleyball for Montana girls. It took many years and hard efforts to sanction it for Montana girls. Four times the Montana High School Association voted down volleyball as a sport for girls and at least 3 times the high school association has voted down traditional seasons for girls' volleyball and basketball. The American Civil Liberties Union and 3 young girls from 3 different Montana High Schools and a Federal Title IX lawsuit has finally started the process towards equality. The Schools, Administrators, School Boards and all the different boards and Educational Associations in this state did nothing to effect change they fought it with a VENGEANCE, and this is exactly what this bill HB ~~400~~ 399 is intended to do.

In March of 1983 House Bill 879 was before the legislature. It was presented by Representative Ray Peck and I have enclosed a explanatory statement of the bill with my documentation. Item #4. Doesn't the Montana's Human Rights Law adequately protect our students. It states that "No guidelines have been published by the Human Rights Commission which elaborate on this provision."

Equality in educational opportunity is addressed in 49-2-307 of the Human Rights Act, but no guidelines are present there. Relief for any student would probably not come in a timely fashion.

The Montana High School Association spent approximately $7,000 lobbying in the 1983 legislature, and the Montana School Boards spent approximately $3,500.
In the testimony they presented on page 4, Item 5. Mr. Waterman, Lawyer for MHSA states, "Already women have remedies under the Federal Constitution, the State Constitution, the Human Rights Act, Section 1983 of the Federal Codes and Title IX of the Federal Codes."

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The Montana School Boards Association stated in their Legislative Hotline of March 8, 1983, "Our statutes on discrimination in education, found in the Human Rights Act, are among the fourth most stringent in the nation." The School Boards Assocation also stated in testimony that, "The Human Rights Commission already has the jurisdiction and the expertise to enforce this area." In another part of their statement the School Boards Association stated, "The point is that everything HB 879 provides is already covered by Montana Law, although not in the same detail. When the Montana Legislature adopted our Human Rights Act in 1974, they made a policy decision that discrimination would be handled in one central agency, rather than piece meal. Passage of this bill would reverse that policy decision and erode the Human Rights Commission's jurisdiction in this area. If this is passed what special interest group will come in next for their own act - the elderly, the handicapped?"

HB 879 did not pass, and the next option for developing rules for discrimination against females in our public school systems had been pointed out by the MHSA and MSBA in their testimony, the Human Rights Commission. The Human Rights Commission was asked by the Women's Lobbyist Fund to work on the developement of rules. They have pursued this in very cautious manner. There have been many meetings of the HRC and many opportunities for everyone to express their concerns. The discussions of rule making has been going on for a considerable time and has not been done in haste or without much study on HRC part.

Again for you to understand the process and how it has developed and you need the documentation and history of the Title IX litigation that occured in 1982. On Dec. 17, 1984 Mr. Gomberg, the Facilitator, in that litigation presented his findings

Page 1.

1. Opportunities for girls to participate in high school athletics in Montana are grossly restricted compared to the those same opportunities for boys.

Page 7.

11. The sexually biased attitudes of some of the coaches, athletic directors, administrators and others are the most significant cause of Montana's high school girls' restricted athletic opportunities.

In the Title IX REVIEW COURT CASE two Equal Assessment Surveys of all our Montana High School were admitted into evidence. The latest one done in the 1985-86 school year still had large amounts of discrimination existing for girls in sports in our schools. I have enclosed our study of the second survey and what we found.

Because of the existing discriminations, Judge Lovell appointed Judge Haswell to investigate the school systems this year, as a Court Master.

I feel that the reaction of school leaders to the HRC developing rules, is the same reaction to equality that Mr. Gomberg found in his study of our school systems. It amazes me that the people who are hired to take care of these problems and have been informed of these problems in so many ways in the past 15 years are the very same people who protest HRC rule developement for equality.

I am also here to tell you that we have only touched the tip of the iceberg for equality for Montana girls in education. On January 12, 1987 my daughter a student-athlete in our Montana High Schools was here to participate in a Proclamation Ceremony for WOMEN IN SPORTS DAY, Feb. 4, 1987.

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After the Ceremony Officials from OPI asked these young women if they knew the meaning of the Title IX Law or what it was. There were about 20 young female athletes present and they did not know the meaning of Title IX and what it had done for them. The education of the young Montana female is lacking about her own individual rights and she does not know she legally has them or how to use them. Such ignorance is inexcusable for young people of Montana.

I will repeat to you how necessary it is for our state to start to acknowledge their responsibility to young women in education. The HRC has started with serious developement of rules and this bill before you is nothing but a knee-jerk reaction of the administratiors and public officials who refuse to come out of the past and start working in society as it is today. They have been costly to our school systems in dollars because of their attitudes and detrimental to our children and their educational development.

As I said before, sports and athletics are the visible part of the discrimination taking place. In the classroom these very same attitudes are affecting our young women in other areas. On January 27, 1987 the Missoulian printed an article on Education and Montana Women.

The math SAT scores showed, Montana female high school students are "scoring much too low" in relationship to male students. Montana ranks 47th out of 51 in full-time enrollment of female students in public colleges and universities. Montana also ranks 47th in the number of bachelor's degrees awarded to women. Montana ranks 48th in the number of master's degrees awarded to women.

This work & these rules should have been developed in 1972, we are 15 years behind. The attitudes of the educational leaders of Montana are in the dark ages. Money is short, and time for young women in educational systems is short, we must began, let us began here and when they are developed let us enforce them them with the same VENGEANCE THAT HAS BEEN USED IN MONTANA TO FIGHT THE EQUALIZING OF EDUCATION FOR MONTANA FEMALES.

Nancy Deden Feb. 10, 1987 Nancy Deden
728-2844
210 Westview Dr.
Missoula, MT 59803

a On Road

s for the Spartans.
eel that we were as as we should have Leonard. "We were first half, but we the second half and ited better."
tal breakdown Bears half of their ng yardage. West ck Scott Perdew ard touchdown run artans had taken a e Bears netted 135 ground.
said he was a little l with the play of ve secondary. e Bears completed f 10 passes for 12 Spartan coach said veren't reacting the capable.
ans will have their with the Hawks. eman hasn't really in three outings, the t two interior lines

onda

n said. The Braves Great Falls punter ne after a bad snap ok advantage of a that went out of set up a short rive.
erheads are 2-1 on after losing 33-0 to st Friday. They ivre 18-15 earlier in The Braves dropped in their non-pener.
ys he expects the to go to the air onda has averaged game in its last two e Braves will be quarterback Kevin row to his favorite nd Bud Sirinich.

which, according to Leonard, outweigh Sentinel's by 25 to 30 pounds per man.

Next weekend, Sentinel will return to Missoula for a contest against the Great Falls Bison while Loyola goes to Hamilton.

Hellgate hosts C. M. Russell Saturday at 1:30 p.m. on the Fairgrounds turf.

Stevensville

Sacred Heart plays Florence at 7:30 p.m. Friday Stevensville meets Victor at 9 Losers will play the first game Saturday night with the title game set for 9.

Probable starters for Sacred Heart will be Kelley Moran, Kate Conley, Noreen McCampbell, Randy Hearst and Kay Lesar. Others on the squad are Linda McBride, Anita Gasparino, Teresa Fellin, Colleen Conley, Joan Ballas, Joleen Fish and Shirley Midyett.

Hellgate and Sentinel will not start their seasons until Oct. 16.

Msla 9/28/73

Things Looking Better For Deer Lodge Girls

JERRAN WHITE

DEER LODGE — Girls basketball begins in the high schools throughout Montana this weekend and Powell County High School is probably typical in the difficulties it has faced keeping the year-old program alive.

Last year, the Deer Lodge team finished second in the state tournament despite inadequate funding, miserable practice conditions and no junior varsity teams to provide reserves and allow more participation.

But this year things will be different for Coach Arlita Fenner and her players when they host Drummond for the opening game Saturday. The administration has provided for a junior varsity team, the early season allows the girls to practice in the boys gym instead of on the concrete floor they used last year and the budget has been increased from $250 to $1,300.

Ten girls from last year's PCHS team turned out again this year and Mrs. Fenner had 40 girls to choose from.

"Last year we had a young team," she said, "and this year we have a good team."

Joe McKay, president of the western girls basketball division, said seven new teams have joined this division, making 21. Montana High School Association official Les Irish says that he expects over 120 girls basketball teams will be competing this season in the four divisions.

The new sport became quite popular last year by the end of the season and McKay predicts that within the next two or three years girls basketball will be funded equitably with boys.

One problem McKay foresees is that the early season will hurt attendance and create a conflict for some girls between cross country and basketball.

The western division tournament will be Nov. 29-Dec. 1 in Missoula and the state tournament will be Dec. 13-15 in Miles City.

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GREAT! (HA)
Trade-off - gave up Class-County in order to get off the "concrete" + more funding.
Boys gave up nothing - This was the start of moving backwards in order to preserve the "BOYS ONLY WINTER GYM!"

INTRODUCTION

House Joint Resolution No. 80 established a select committee to investigate athletic and nonathletic interscholastic activities in Montana. By implication, the resolution directed the select committee to evaluate the control of inter-school activities by the Montana High School Association (MHSA) and to determine whether governmental supervision of inter-school activities is necessary or desirable. The resolution further directed the select committee to report the results of its investigation to the 1975 Legislature.

The resolution resulted from a growing concern by the public and by legislators regarding MHSA governance of extracurricular programs for Montana high schools. During the past several years, heated debate has enveloped the MHSA. Lay people and school officials have formed strong opinions -- pro and con -- about the association. That the MHSA plays an important role in the lives of high school students is not denied by recent observers of Montana interscholastic activities. By its study, the select committee hoped to provide a constructive forum for analyzing and discussing the aims of Montana inter-school programs and to determine to what extent the state should regulate those activities.

At its first meeting, the select committee directed the staff of the Legislative Council to gather data on and research the area of interscholastic activities in Montana and in other states. Specifically, the committee prepared and directed the staff to conduct three informational surveys: Survey of Montana Inter-School Activities; Survey of State Inter-School Activities Associations; Survey of Girls' Athletics in Montana. In addition, written testimony was solicited from the public and from the staff of the MHSA in lieu of a public hearing.

This report presents a description and analysis of interscholastic activities at the secondary school level and the select committee's deliberations and decisions. The descriptive and analytical portion of the report, which provided a forum for committee discussion, is based upon a study of the MHSA and other state associations, upon interviews, research of pertinent literature, and upon the results of the committee's surveys. The committee's recommendations are attached as Appendix I and Appendix II. The resolution (Appendix I) urging equity between boys' and girls' athletics was adopted unanimously. The bill (Appendix II) empowering the Board of Public Education to oversee organizations regulating interscholastic activity was adopted by a 3 to 2 vote of the committee.

An analysis of inter-school activities necessarily involves questions of philosophy in which consensus is absent. The committee and the staff have attempted to focus on the more

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inter-school activities from the MHSA to the state education department would not significantly alter the structure and practices of interscholastic activities. Neither the MHSA nor the Superintendent's office are capable -- and they cannot be expected to be capable -- of controlling parental and community interest in and influence upon athletics at the local level.

The responsibility for insuring that educational values are met in inter-scholastic activities lies more properly with school trustees at the local level. The MHSA, which is comprised of school administrators, can collectively establish rules of eligibility thereby preventing the proselyting of athletes and abuse of the games. But the MHSA cannot insure -- and has not insured -- that interscholastic competition achieves accepted educational goals. The MHSA cannot completely control the abuses of competition and undue partisanship that arise at the local level, and neither could the Superintendent's office, according to our research. At the same time, neither office could escape the harsh criticism generated when unpopular rulings are made that limit the competitive edge of a particular community.

SCHOOLS AVOIDED SANCTIONING VOLLEYBALL IN THIS WAY. *

The fact that the MHSA has been used to make unpopular decisions "to take the heat off" local school officials has served to heighten criticism of the association. Numerous people have cited examples of school trustees declaring "such and such" at the local level, and then phoning the MHSA staff to ask them to void that decision. As one legislator noted in 1969:

> School boards don't always want responsibility for overseeing inter-school activities because if a player is declared ineligible, the heat would be on them rather than on a far-off organization. [52]

Unless local educators take more direct responsibility for insuring a worthy inter-school program, capable of meeting educational goals, any organization -- whether it be the MHSA or the Superintendent's office -- will probably bear the brunt of criticisms arising from controversy in the emotional and highly charged area of interscholastic competition.

Girls' Athletics in Montana *

Another facet of Montana interscholastic activities that demands discussion is girls' athletics. Have girls' inter-school athletics been treated fairly by Montana educators and administrators? What is the role of the MHSA and local school boards in girls' athletics? Who should have responsibility for insuring a sound girls' athletic program? These and other questions involving girls in sports have only recently generated discussion and debate among Montanans.

Girls' interscholastic competition at the secondary school level is a relatively recent phenomenon in Montana. The MHSA has

sponsored championship play for girls' track and field only since 1969. And MHSA-controlled championship play for girls' basketball is only one year old. Girls have had athletic teams, e.g., basketball and volleyball, for many years.[53] But only recently have girls' athletics begun to receive attention even remotely comparable to that granted boys' athletics.

Many inequities exist between girls' and boys' athletics. And the inequities are in favor of the boys. Ninety percent of Montana high schools, according to the committee's survey, expend over twice as much money for boys' athletics as for girls' athletics. A similar percentage pay their boys' basketball coach twice what they pay their girls' basketball coach. Moreover, in interviews, officials and coaches noted that girls' teams are not permitted the same access to athletic facilities accorded boys' teams. Not uncommonly, girls' basketball teams hold practice sessions in the early hours of the morning, before school begins because the various boys' teams have sole access to gym facilities during after-school hours. Finally, girls' teams competing under the auspices of the MHSA are limited to far fewer games than boys' teams.[54]

Reasons for the inequities between boys' and girls' athletics are many and varied. Traditions and bias have dictated that girls should be groomed for childbearing and for kitchen duties; that girls are more fragile than boys and, hence, unable to withstand the strain of competitive sports; that sport is a masculine undertaking; and that girls simply are not interested in competitive sports.[55]

These rationalizations are steeped in mythology. Numerous studies have destroyed the fiction that girls are physically more fragile than boys. Other studies have demonstrated that when girls are provided the opportunity to participate in sports they are most enthusiastic. For instance, in Iowa, where girls' and boys' teams enjoy equal funding, practice facilities, and coaching, thousands of females participate in competitive sports.[56] Any lack of interest on the part of girls is the fault of society which has discouraged girls from participating in competitive sports for so many years.[57]

The primary reason why institutions and administrators have resisted improving girls' competitive athletics has been pinpointed, according to a recent Sports Illustrated article, by Harvard's Dr. Clayton Thomas. He stated:

> The appearance of girls' teams to utilize sports facilities not previously required by them will have great economic impact on schools, colleges and communities. If, by some miracle, women suddenly begin using public and private athletic facilities to even half the extent they are used by men, then the overcrowding would be catastrophic.[58]

Responses to the committee's survey on girls' athletics bear out

HAVE MANAGED TO CONTROL THEIR "FEAR" AND HAVE PROCEEDED WITH GIRLS + BOYS EQUALLY.

this fear.[59] Whether the situation would be catastrophic depends, of course, on one's outlook.

A marked increase in participation by girls would force radical change on public school systems. Faced with financial crises and rising costs, many schools have sought ways to reduce athletic expenditures. If the inequities between boys' and girls' athletics are to be rectified, the most likely alternative is to take resources from the programs now operated for the benefit of males.[60] Moreover, as mentioned earlier, schools and organizations receiving federal funds may be required to upgrade girls' athletics substantially. Many school administrators believe that improving girls' competitive sports is desirable and necessary. For instance, James Bergene, principal of C. M. Russell High School in Great Falls, was quoted recently as stating:

> If athletics have a place in education then they are as important for girls as boys. If they have no general educational value, if they are just something for boys and to entertain townspeople and alumni, then we should get rid of them. Any principal who is willing to support a strong boys' athletic program and is content to have a weak girls' one has no business calling himself an educator.

C. M. Russell, which Sports Illustrated cited as having an excellent girls' athletic program, spent $15,000 for girls' and $35,000 for boys' athletics in 1972-73, a ratio Mr. Bergene hopes is narrowed in the future.[61]

This has never been done

The responsibility for upgrading and promoting girls' competitive athletics lies as much with the MHSA as with local school administrators. To argue otherwise, as did many respondents to the committee's survey, is to ignore the structure of the high school association.[62] The MHSA is local school administrators; and the MHSA administers boys' and girls' inter-school competition.

The problem, therefor, is to ascertain what the MHSA is doing to establish parity between girls' and boys' athletics. According to the MHSA staff, the high school association is now conducting women's athletics "exactly the same" as it is handling boys' athletics. It must be assumed that the MHSA manages girls' and boys' athletics "procedurally" the same, for the staff presented no evidence to demonstrate that girls' athletics are on a par with boys' athletics in terms of funds allocated and numbers participating. Moreover, the MHSA staff's contention that Montana high schools have taken a more positive position on girls' athletics than other states suggests that the MHSA is unjustifably complacent regarding girls' athletics in Montana.[63] Certainly evidence contrary to that cited earlier must be presented before the MHSA can assume a laudatory stance vis-a-vis girls' sports.

Undoubtably, the status of girls' athletics in Montana has

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improved in recent years. Much more, however, remains to be done. Over 70% of those responding to the committee's survey believe that girls' should be given greater opportunity to participate on girls' teams. Several state associations, moreover, have adopted positive and visible policies regarding girls' participation in sports.[64]

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IDENTIFYING THE GOALS OF INTERSCHOLASTIC COMPETITION

The one aspect of interscholastic competition that begs for clarification and reevaluation is goals. Exactly what should be the aims and objectives of inter-school programs? This report can only relate what others have said on this subject.

The Commissioner of State Education in New York recently noted that special vigilance must be taken to prevent overzealous competitiveness in high school activities. Speaking before the National Federation of State High School Associations, he stated:

> It is incumbent upon all of us to keep inter-scholastic activities and sports in proper perspective, in balance with what else the schools have to do, and without the abuses and evils...which have surfaced to public view throughout the nation in recent years at all levels of athletics, Little League, high school, college, professional ranks.

Then in a series of rhetorical questions, the New York Commissioner identified what he thought was the major problem in inter-school athletics today: Rules and regulations, and athletic contests are operated primarily for the benefit of the "prideful expectations of parents," "the principal of the school and the enhancement of his leadership position," and "for the coaches and the advancement of their careers," -- not for the students.[65] The Commissioner concluded by suggesting an antidote for the problem. He stated that in seeking to improve and expand interscholastic sports:

> We must all keep the humanistic ends of education in mind, namely, to teach our youth in ways that will enable them to live a life, a creative, sensitive and humane life, to teach our youth in ways which will make them richer on the inside than they are on the outside, so that when they knock on themselves, they will find something at home.[66]

Another authority on athletic competition commented recently upon the role of the spectator in sports. He thought that the fan should enjoy the high skill level of the performer, that while competitiveness and partisanship were not bad traits, they are all too often abused by the fan whose chief concern is in the final

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Alternative 2: Intramurals and Girls' Athletics

Recommend to the MHSA that interscholastic athletics for girls in the larger schools must be conducted only as an outgrowth of a sound intramural program in a sport.[70] Several state high school associations have adopted this policy. It seems to be a sound policy, and there is no reason why girls' athletics should not avoid the worst aspects of boys' athletics. The smaller schools (most schools in Montana are Class B and C) would not need to abide by this policy because of limitations in school enrollment.

Alternative 3: Girls' Athletics

Recommend that both the MHSA and the Superintendent of Public Instruction actively promote equity between boys' and girls' athletics. The rationale for this recommendation has been discussed earlier.

As a variation of this alternative, recommend to the MHSA that the girls' basketball season be the same as the boys' season. There seems no reason to have girls' basketball in the fall and boys' in the winter. Consideration might also be given to holding boys' and girls' basketball games together.[71]

Alternative 4: Composition of the MHSA Board of Directors

Recommend that the MHSA Board of Directors be substantially enlarged to include: (1) a voting representative from the Office of the Superintendent of Public Instruction; (2) a representative from music; (3) a representative from speech; (4) a representative from athletics; (5) a woman coach, activity director, or physical education teacher. Enlarging the Board of Directors might involve more expense in meetings, travel, etc. However, it would decidedly aid in making the MHSA more democratic. No other state high school association has as few members on its Board of Directors as the Montana High School Association.[72]

Alternative 5: Revisions in MHSA Rules and Regulations, and a Curtailing of MHSA-Sponsored Activities

The committee recommends changes in the rules of the association, and recommends that some activities controlled by the association be returned to local school board control.

Alternative 6: Transfer the Functions of the MHSA to the Office of the Superintendent of Public Instruction

The pros and cons of this action have already been discussed at length in this report.

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LAWS OF MONTANA 1975 V. 2

RESOLUTIONS

HOUSE JOINT RESOLUTION NO. 2

JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA URGING ALL SCHOOL OFFICIALS, THE SUPERINTENDENT OF PUBLIC INSTRUCTION AND THE MONTANA HIGH SCHOOL ASSOCIATION TO PROMOTE EQUITY BETWEEN BOYS AND GIRLS INTERSCHOLASTIC ACTIVITIES.

WHEREAS, interscholastic activities are an integral part of the educational process for girls as well as for boys, and

WHEREAS, inequities exist between girls' and boys' interscholastic activities in such areas as the salaries of the coaches of girls'teams, the use of facilities for interscholastic activities by girls' teams, and the number of opportunities available for girls to participate in interscholastic activities, and

WHEREAS, the Department of Health, Education and Welfare, under the authority of the United States government, has declared that federal assistance may not be available to schools that discriminate in extracurricular activities on the basis of sex, and

WHEREAS, equality of opportunity can be best achieved in an atmosphere where those in positions of influence or leadership do their best to promote that opportunity.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA

That the legislature urges all school officials including coaches, administrators and trustees, the Superintendent of Public Instruction, and the Montana High School Association to actively and aggressively promote equity between boys' and girls' interscholastic activities.

Approved January 30, 1975.

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BROWNING & KALECZYC
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March 15, 1983

To: Representative Ray Peck

Re: HB 879

In light of the testimony presented at the hearing on HB 879, the Educational Equality Act of 1983, and the decision of Chairman Brown to provide for a question and answer period on this bill on Wednesday, March 16, I have prepared a series of questions and answers which I hope will help clear the air with respect to the legal aspects of this proposal.

1. Does this bill elevate extracurricular activites to a constitutional right?

No, as a matter of law, the Legislature can not rewrite the Montana Constitution by this bill. If there exists a constitutional "right" to participate in extracurricular activities, that "right" exists irrespective of HB 879.

Moreover, HB 879 does not say that the ability to participate in extracurricular activiites is a constitutional right. Rather, what HB 879 does say is: "Inequality in ... educational opportunities ... is a breach of Article II, section 4 ... and Article X, section 1." There is no questions that, as a matter of law, the opportunity to participate in extracurricular activities is protected, and inequality of opportunity is illegal. Significantly, the opponents of HB 879 do not dispute either of these contentions. Having the opportunity to participate does not excuse students from the obligation to follow applicable rules and eligibility requirements (whether established by the school or by a coach), unless those rules themselves promote inequality.

2. Does HB 879 require anything more than is presently required by Title IX?

No, a school district in compliance with Title IX would be in compliance with HB 879. While the opponents of HB 879 made their "constitutional rights" argument, they did not dispute the basic proposition that Title IX compliance equals compliance with HB 879.

The idle speculation of the Montana School Board Association that HB 879 could result in the building of new facilities has no legal basis, unless the school district is not in compliance with Title IX. And, it is my understanding that all school districts in Montana have stated that they are in compliance. Thus, the Montana School Board Association's argument is without merit.

3. Why enact this bill if it duplicates Title IX requirements?

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There are several reasons:

a. Emerging court decisions and decisions of U.S. Department of Education raise the distinct possibility that, as a matter of law, the Federal government will be precluded from enforcing Title IX with respect to all educational programs, and will be limited to review only those programs which directly receive federal funds.

If this happens, the Montana Human Rights Commission, as a referral agency of the Office of Civil Rights (OCR), U.S. Department of Education, will have no greater right to investigate Title IX violations than the federal government.

b. In addition, there is a genuine concern that the federal government is retrenching from Title IX enforcement. The representation made to the Montana School Board Association by Federal OCR representatives that the same level of enforcement will continue is scarcely a resounding commitment to aggressive enforcement.

4. Doesn't Montana's Human Rights Law adequately protect our students?

Equality in educational opportunity is addressed in 49-2-307 of the Human Rights laws. Significantly, the first three subsections of this provision deal with discrimination in application, admission and enrollment. Only subsection 4 contains a general catch-all clause which defines that it is an unlawful discrimination practice "to announce or follow a policy of denial or limitation of education opportunities." No guidelines have been published by the Human Rigths Commission which elaborate on this provision.

As a result, absent HB 879, a student who complains that he or she was denied equality of opportunity under 49-2-307 could be required to litigate the definition of equality of opportunity provided in HB 879, as well as the issue of whether discrimination occurred.

In addition, as you pointed out in your testimony, the backlog of cases makes it unlikely that a student would get any legal relief to which he or she might be entitled in a timely fashion.

5. Would passage of this legislation bias the litigation pending in federal court?

Section 2 of the bill states that its purpose is to prohibit discrimination. Section 2 does not contain a specific legislative finding that discrimination is widespread. Accordingly, the plaintiffs in the law suit will still have to prove their case.

The fact that the plaintiffs' attorneys asked who has testified on behalf of the defendants on HB 879 is irrelevant. This is a standard technique which is used in litigation to help develop a list of potential witnesses who might be questioned as part of the preparation for trial.

6. Would passage of this bill require OPI to adopt new procedures or incur extraordinary expenses?

If OPI is in compliance with the Title IX requirement that recipients of federal funds establish grievance procedures, no new procedures are required.

With respect to expense, you have already testified as to the Washington State experience, where additional costs to enforce a virtually identical law are minimal.

7. Won't passage of this bill open the floodgates for litigation?

Section 7 of the bill provides on the state level the same legal rights afforded to aggrieved parties in federal courts. Title IX permits equitable relief; and, 42 U.S.C. § 1983, the civil rights provisions of federal law, provides for civil damages. Thus, Section 7 gives plaintiffs nothing that they do not already have in a federal forum. It does, however, give them the ability to get that relief in state courts.

More importantly, if this legislation makes it clear to students that they are protected against discirmination; and, as a result, they seek to insure that protection by filing complaints with OPI, by instituting adminstrative procedures before their local school boards, or, in the extreme case, by filing court actions, then HB 879 can hardly be criticized for giving individuals the means to be free from discrimination.

In the context of equal access to educational opportunities, only those who are not in compliance with TItle IX need fear efforts by individuals to enforce Title IX.

BROWNING & KALECZYC

by: Stanley T. Kaleczyc
Stanley T. Kaleczyc

THE STATE OF MONTANA
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CAPITOL STATION
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PRINCIPALS OF REGISTERED LOBBYISTS

FORM L-5 (Rev. 11/81)

(TYPE OR PRINT CLEARLY)

NAME AND ADDRESS OF PRINCIPAL	REPORTING PERIOD	CHECK APPROPRIATE BLOCK
Montana High School Association [illegible] Dakota Avenue [illegible] 59601	From February 24, 1983 to March 24, 1983	February 16th report 60-day post-session X Monthly report There are no expenditures to report this period

PART I

List each lobbyist paid, reimbursed or retained during the period covered by this report

NAME OF LOBBYIST	ADDRESS
Ron Waterman	301 First National Bank Building
	P.O. Box 1686
	Helena, MT 59604

Check if additional sheets attached [ ]

PART II

List total payments and costs for lobbying-related activities in the following categories:

(a) Travel & personal living expenses for lobbyists reimbursed by principal	$
(b) Salaries, fees & other compensation paid to lobbyists (except food, beverage & entertainment expenses)	6,288.75
(c) Expenses of food, beverages and entertainment related to lobbying efforts (whether paid directly by principal or reimbursed to lobbyists; do not include those itemized in part III below)	
(d) Advertising, including production costs	
(e) Miscellaneous office and other expenses related to lobbying efforts	16.25
TOTAL	$ 6,305.00

EXHIBIT 5
DATE 2-24-83
HB # HB 879

THE STATE OF MONTANA
COMMISSIONER OF POLITICAL PRACTICES
CAPITOL STATION
HELENA, MONTANA 59620
PHONE (406) 449-2942

PRINCIPALS OF REGISTERED LOBBYISTS

FORM L-5 (Rev. 11/81)

HB-879 (21a)

(TYPE OR PRINT CLEARLY)

NAME AND ADDRESS OF PRINCIPAL	REPORTING PERIOD	CHECK APPROPRIATE BLOCK
Montana High School Association [illegible] South Dakota Avenue Helena, MT 59601	From January 1983 To April 1983	February 16th report 60-day post-session Monthly report There are no expenditures to report this period

PART I

List each lobbyist paid, reimbursed or retained during the period covered by this report

NAME OF LOBBYIST	ADDRESS
Ronald F. Waterman	P.O. Box 1715, Helena, MT 59624

Check if additional sheets attached [ ]

PART II

List total payments and costs for lobbying-related activities in the following categories:

(a) Travel & personal living expenses for lobbyists reimbursed by principal	$ 0.00
(b) Salaries, fees & other compensation paid to lobbyists (except food, beverage & entertainment expenses)	451.25
(c) Expenses of food, beverages and entertainment related to lobbying efforts (whether paid directly by principal or reimbursed to lobbyists; do not include those itemized in part III below)	0.00
(d) Advertising, including production costs	0.00
(e) Miscellaneous office and other expenses related to lobbying efforts	0.00
TOTAL	$ 451.25

THE STATE OF MONTANA
COMMISSIONER OF POLITICAL PRACTICES
CAPITOL STATION
HELENA, MONTANA 59620
PHONE (406) 449-2942

PRINCIPALS OF REGISTERED LOBBYISTS

L-5 (Rev. 11/81)

(TYPE OR PRINT CLEARLY)

NAME AND ADDRESS OF PRINCIPAL	REPORTING PERIOD	CHECK APPROPRIATE BLOCK
Montana School Boards Association 501 North Sanders Helena, MT 59601	From January 1, 1983 To February 1, 1983	February 16th report 60 day post-session X Monthly report There are no expenditures to report this period

EXHIBIT #3 2-11-83 SB 336

PART I

List each lobbyist paid, reimbursed or retained during the period covered by this report

NAME OF LOBBYIST	ADDRESS
Wayne G. Buchanan	425 Butler, Helena, MT 59601
Charles Erdman	624 Logan, Helena, MT 59601
Jeff Minckler	2500 Heritage Drive, Helena, MT 59601
Sue Romney	7021 Highland, Helena, MT 59601

Check if additional sheets attached [ ]

PART II

List total payments and costs for lobbying-related activities in the following categories:

Travel & personal living expenses for lobbyists reimbursed by principal	$ -0-
Salaries, fees & other compensation paid to lobbyists (except food, beverage & entertainment expenses)	$651.00
Expenses of food, beverages and entertainment related to lobbying efforts (whether paid directly by principal or reimbursed to lobbyists; do not include those itemized in part III below)	$677.50
Advertising, including production costs	-0-
Miscellaneous office and other expenses related to lobbying efforts	$190.00
TOTAL	$ $1518.50

THE STATE OF MONTANA
COMMISSIONER OF POLITICAL PRACTICES
CAPITOL STATION
HELENA, MONTANA 59620
PHONE (406) 449-2942

PRINCIPALS OF REGISTERED LOBBYISTS

L-5 (Rev. 11/81)

(TYPE OR PRINT CLEARLY)

NAME AND ADDRESS OF PRINCIPAL	REPORTING PERIOD	CHECK APPROPRIATE BLOCK
Montana School Boards Association 501 North Sanders Helena, MT 59601	From February 1, 1983 To April closure	February 16th report X 60 day post session Monthly report There are no expenditures to report this period

PART I

List each lobbyist paid, reimbursed or retained during the period covered by this report

NAME OF LOBBYIST	ADDRESS
Wayne G. Buchanan	425 Butler, Helena, MT 59601
Charles Erdman	624 Logan, Helena, MT 59601
Jeff Minckler	2500 Heritage Drive, Helena, MT 59601
Sue Romney	7021 Highland, Helena, MT 59601

Check if additional sheets attached [ ]

PART II

List total payments and costs for lobbying-related activities in the following categories:

(a) Travel & personal living expenses for lobbyists reimbursed by principal	$ -0-
(b) Salaries, fees & other compensation paid to lobbyists (except food, beverage & entertainment expenses)	1,475
(c) Expenses of food, beverages and entertainment related to lobbying efforts (whether paid directly by principal or reimbursed to lobbyists; do not include those itemized in part III below)	200
(d) Advertising, including production costs	-0-
(e) Miscellaneous office and other expenses related to lobbying efforts	349
TOTAL	$ 2,024.47

SEE NEXT PAGE

for exclusively women drill teams which are a popular activity in many schools. Because up to now extracurricular activities have been a privilege and not a right, we have been confident the Association could withstand an attack by a male demanding to join such a team. Under this act this activity becomes a right and schools will be required to include males. In sports, up until recently, the Association had equality in sports opportunities, in the legal sense, because in every sport there was either a team for both boys and girls or the team was open to either sex. This procedure is legally permissible. However, actual participation in some contact sports demonstrate that equality in the legal sense is not always fairness. In practice very few women have any interest in participating in heavy contact sports. Therefore, womens' volleyball was sanctioned last winter by the Association. This sport is unique in that there is no corresponding mens' team. It is the only sport in Montana in which only one sex has access. Without this act we are confident the Association can defend that status. With the passage of this act, any offered defense would be doubtful.

5. This act subjects the schools of Montana to the burden of complying with still another perspective on exactly what constitutes sex discrimination. There is no corresponding benefit to either the school or to women. Already women have remedies under the Federal Constitution, the State Constitution, the Human Rights Act, Section 1983 of the Federal Codes and Title IX of the Federal Codes. In the Association's experience, no two opinions are alike as to what is and is not unlawful discrimination. This act will not enjoy exclusive jurisdiction in this area; it will make no definitive statement as to what is and is not permissible. It will only subject the schools to still one more opinion as to what ought to be done and how fast it should be accomplished.

6. Finally, consideration should be given to the provision of the act creating a private legal remedy favoring all parties who believe they have been discriminated against. The threat of suit may deter action to correct inequities since such efforts may become evidence of past discrimination. Moreover, the likelihood of a multiplicity of litigation is substantial. One state which recently permitted extracurricular decisions to be challenged by administrative and court review experienced an increase in suits from five suits to 273 suits in the first year after the change occurred. A similar increase in litigation could be predicted should this bill pass.

06223

MTSBA
LEGISLATIVE HOTLINE
Boards Association
501 North Sander
Helena, Montana 5960
Telephone: 406/442-2180
Wayne G. Buchanan, Executive Direct
DISTRICT CLERKS--PLEASE DUPLICATE THIS FOR ALL YOUR BOARD MEMBERS AND ADMINISTRATORS AND GET IT INTO THEIR HANDS AS SOON AS YOU CAN.

H-(7)
2-11-87
HB 399

pecial Mailing To Board Chairmen and Superintendents March 8, 1983

LEGISLATIVE ALERT - HB 879

HB 879, the bill which deals with sex discrimination in education will be heard in the Senate Education Committee on Monday, March 14, at 1:00. The impact of this bill on school districts in Montana was reviewed in the last issue of the Hotline.

The proponents of this bill claim that similar bills have passed in other states and Montana should take a leadership position by adopting HB 879. Montana currently holds a leadership position in this area. Our statutes on discrimination in education, found in the Human Rights Act, are among the fourth most stringent in the nation. Passage of HB 879 would merely be redundant. In addition, the identical provisions are found in Title IX on the federal level.

Proponents of this bill have assured us that passage of this bill will "get the Feds out of sex equity in Montana." They have stated further that there are current plans to decrease enforcement of Title IX, the federal act which prohibits sex discrimination in schools. We contacted Dr. Gilbert Roman, district director of the Office of Civil Rights of the Department of Education in Denver. Dr. Roman has assured us most emphatically that both assumptions are false. Cutbacks in Title IX enforcement are not being considered and O.C.R. will continue to investigate and prosecute actions filed under Title IX regardless of any state law on the subject. This, as we stated in the last Hotline, would put school districts in the position of having to win in both forums in order to prevent forced compliance with the suit.

The bill would require OPI to create an expensive enforcement bureau to ensure schools were in compliance with the Act. If OPI found a school had discriminated in such areas as counseling and guidance services, textbooks and instructional material, or recreational and athletic activities, the end result could be the elimination of state funding to the district until the situation was corrected. Some districts may be forced to hire compliance personnel and to remodel or construct additional facilities.

We have been informed by attorneys for the Montana High School Association HB 879 would eliminate its role as regulating extracurricular events. The bill defines athletic events as being an educational right under the Montana Constitution. Once defined as an 'educational right', the supervision must be placed within OPI. Athletics would also become a constitutional right of the students and school boards may lose the discretion to offer various athletic events, regardless of the financial condition of the district.

Equality in education is a goal we all subscribe to. Discrimination, whether it be on the basis of sex, race, color, social origin or political or religious ideas must be eliminated. We feel, however, that there are sufficient laws in existence which address the problem. A mere restatement of the law is a needless act. The only thing this bill would accomplish is to saddle OPI with an expensive enforcement program; cost the districts a substantial amount of money to hire compliance personnel and bring facilities into compliance; eliminate the Montana High School Association and replace it with OPI regulation.

MONTANA SCHOOL BOARDS ASSOCIATION

501 North Sanders
Helena, Montana 59601
Telephone: 406/442-2180
Wayne G. Buchanan, Executive Director

H-8
2-11-87
399

TESTIMONY OF CHIP ERDMANN
HB 879

This bill prohibits sex discrimination against students in Montana's public schools. It specifically refers to counseling and guidance services; recreational and athletic activities; course offerings and textbooks. All of these areas are currently covered by Title IX on the federal level (which the bill was patterned after) and the Montana Human Rights Act, and in part, the Governmental Code of Fair Practices.

WHAT IS THE STATED NEED FOR THIS ACT?

The proponents claim that the federal government is withdrawing its enforcement of Title IX and that this act is needed to fill the vacuum. They also claim that if this act is adopted the federal government will stay out of Montana in this area.

Our research has shown these concerns to be unfounded. The administrator of the Office of Civil Rights, which enforces Title IX in Montana informed me that:

1) The Office of Civil Rights was not decreasing their level of Title IX enforcement in Montana.
2) Regardless if this act passes, they are under a statutory mandate to investigate and take action on all complaints filed with them. This bill would have no effect on their enforcement efforts in Montana.

IS THIS ACT NECESSARY IN MONTANA?

Currently Montana has two statutes which deal with discrimination in education. Section 49-2-307 in the Human Rights Act and Section 49-3-203 in the Governmental Code of Fair Practices. S 49-2-307 is a comprehensive statute dealing with all types of discrimination in education, with enforcement by and through the Human Rights Commission.

Attached is a summary of all state laws dealing with discrimination in education. There are 7 states that have comprehensive acts which are enforced by specific agencies. The remaining states have statutory prohibitions against discrimination, but with no enforcement agency.

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2-11-87
HB #399

Personnel will have to be hired, or diverted from other areas, to ensure compliance. The athletics section (page 4, line 4-25) plainly states there will be no disparity based on sex for equipment and supplies, etc. That will require an expenditure of funds. The facilities must be comparable - remodeling or construction will be required in many schools. Further, under the civil action section, a court could order a school district to construct or remodel.

PRIVATE SCHOOL IMPACT

Another consideration to look at is the impact on private schools. By raising athletics and extracurricular events to a constitutionaly guaranteed "educational opportunity" private schools will be affected. Although the bill only addresses public schools by name, the Constitution applies to everyone, and this could force private schools under more state jurisdiction than this legislature has envisioned.

CIVIL RELIEF SECTION

Section 7 of the bill would create a private right of action for an individual to come in and sue a school district for money damages and equitable relief. This is an extention of Title IX, which does not provide for a private right of action. If a school district is alleged to have discriminate even if they are working to remedy the situation, they will be liable for civil damages.

The equitable relief provision also causes us some concer Take the area of textbooks - the manufacturers of textbook series are aware of the sex bias issue and new series generall do not have problems in that area. As old series of textbooks wear out or are outdated schools order the new series. Eventually there will be no sex-bias text books in Montana schools. Under this section an individual could bring a lawsuit alleging that various textbooks series used by a district were sex-biased. If the court agreed it could order the district to immediately replace these series. A series could easily cost between $60,000 to $70,000.

The proponents may claim this will not happen under the act. The point is that it could, and if it happened the district could be in real financial trouble.

SUMMARY

School districts view this bill as being unnecessary. The Human Rights Commission already has the jurisdiction and the expertise to enforce this area. The bill would take away local control in athletics and other extracurricular events. While the cost impact is impossible to calculate, it would be significant. We urge a do not pass on HB-879.

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#399

Of the 7 states that have detailed statutes, two general groups become clear. Those states that have adopted acts specifically dealing with sex discrimination in education, with enforcement in the state education office. (Washington, Alaska, Nebraska) These states do not have a specific statute dealing with discrimination in their Human Rights Law. The other four states have decided to address this area through their Human Rights Commission (Montana, Idaho, South Dakota and Pennsylvania)

The point is that everything HB 879 provides is already covered by Montana law, although not in the same detail. When the Montana Legislature adopted our Human Rights Act in 1974, they made a policy decision that discrimination would be handled in one central agency, rather than piece meal. Passage of this bill would reverse that policy decision and erode the Human Rights Commission's jurisdiction in this area. If this is passed what special interest group will come in next for their own act - the elderly, the handicapped?

WHAT WILL BE THE EFFECT OF
TWO STATE ENFORCEMENT AGENCIES

If this bill passes, both OPI and the Human Rights Commission will have administrative authority in the area of sex discrimination in education. This will lead to two separate bodies of administrative law developing in the same area in Montana. It will lead to "forum shopping." A person who alleges a complaint in this area can file with OPI, and if they are not satisfied, can then file with the Human Rights Commission and then with the Office of Civil Rights.

This will cause needless expense to both the state and the districts as the same issues are relitigated over and over again.

WHAT WILL BE THE EFFECT
ON THE DISTRICTS

By raising athletics and extracurricular events to be included in the "educational opportunities" guaranteed by the Montana Constitution, several problems are created for the school districts. If participation in athletics is a constitutional guarantee, can the school drop a sport due to financial reasons? It may not be able to under this act, and it certainly gives someone the right to challenge such an action by a school board.

The proponents claim this act will not cost the districts any money. A careful reading of this bill clearly demonstrates that the bill will have a major financial impact on many districts.

#9
2-11-87
399

DEC 17 1984

BARRY GOMBERG of
DAVID BERT HAVAS AND ASSOCIATES
Facilitator
Harrison Place, Suite 216
3293 Harrison Boulevard
Ogden, Utah 84403
Telephone: (801)399-9636

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

Civil Case No. 82-59-M

KARYN RIDGEWAY, et al. :

Plaintiffs, : FACILITATOR'S REPORT ON SEASONS ISSUE

vs. :

MONTANA HIGH SCHOOL ASSOCIATION, et al. :

Defendants. :

FINDINGS

Based upon my investigation into the relative athletic opportunities of boys and girls in Montana high schools, I submit to this Court the following findings:

1. Opportunities for girls to participate in high school athletics in Montana are grossly restricted compared to those same opportunities for boys. Indicators include:

a. Relative numbers of male and female participants.

b. Relative expenditures for male and female activities.

e. Montana volleyball teams would have less competition for practice and competition time in the gym in the proposed fall season than they do in the winter.

7. The relative advantages and disadvantages make the proposed fall volleyball season significantly more advantageous for Montana girls than the current winter season.

8. Girls' basketball and volleyball need to be in different seasons in order to provide maximum opportunities for girls.

9. Boys' basketball and football need to be in different seasons in order to provide maximum opportunities for boys.

10. There is a strong need for a viable indoor girls' sport in the winter in Montana.

11. The sexually biased attitudes of some of the coaches, athletic directors, administrators and others are the most significant cause of Montana's high school girls' restricted athletic opportunities.

12. The defendants in this case, including the Montana High School Association and the Montana Office of Public Instruction are making good faith efforts to implement the Negotiated Settlement Agreement.

13. There are opportunities to address many of the inequities in Montana's high school athletic programs within the current seasonal structure.

1985-86 School year
H-10
2-11-87
#399

VIOLATIONS OF THE S/A FROM THE SECOND EQUAL ATHLETIC OPPORTUNITIES SELF-ASSESSMENT SURVEY

IV. B.2.i. Number of Offered Sports. The school districts shall offer the same number of sports for both males and females during the individual school year except as provided below. School districts shall make the choice of which individual sports shall be offered for males and females based upon their students' interests and abilities.
If during a school year a school district does not offer the same number of sports for both female and male students, the school district is not in violation of this provision IF if makes an explicit and deliberate effort to increase interest in an additional sport for the sex of the students having fewer sports, conducts a survey, and establishes that there is insufficient interest in an additional sport or that the interest would be insufficient to field a team in any sport in which an interest has been expressed. If a school district or school does not offer an equal number of sports for females and males because it has established there is insufficient interest during that school year, the school district shall make an explicit and deliberate effort to equalize sports for females and males during the subsequent school year and shall continue to make such efforts until the sports are equalized.
If the explicit and deliberate efforts of a school district to equalize sports for females and males result in a survey of interest demonstrating that a particular sport would receive sufficient support to field a team, the school district shall offer that sport to the extent of the financial ability of the school district. The school district must consider all alternatives to equitably distribute finances among the extracurricular athletic program including elimination or substitution of one sport for another as participated in by the other sex. However, a limitation of funds shall not be a justification for offering an unequal number of sports for males and females.

SECOND Equal Athletic Self-Assessment Survey- Items 6-9 (p. 44-47)
DIFFERENCES IN SPORTS BY SEX AND SEASON FOR 1985-86
[redacted] SPORTS DIFFERENCE BY SEX FOR 1985-86

[redacted] MORE SPORTS FOR BOYS in 1985-86. (55 SCHOOLS)

10 schools did not answer and were not included in the data. 4 schools returned surveys with insufficient information. These should be added to the 55 schools (+ boys' sports) 55 + 14 = 69 SCHOOLS

38% is a possible projection of MORE SPORTS FOR BOYS in 1985-86 using data above.

7 schools projected more sports for girls than boys. This data is questioned and will be verified by M.Clark. 4 schools in the first survey saying more sports for girls than boys WERE IN ERROR, with 2 schools being equal and 2 schools + boys sports.

[redacted]% projected MORE SPORTS FOR [redacted].

Including the 10 schools not answering and the 4 with insufficient information would change the percentage to-

71% is a possible projection of MORE SPORTS FOR BOYS in 1985-86 using data above.

DATE 2-11-87

Violation HB 2nd S/A-continued #399

SECOND Equal Athletic Self-Assessment Survey- Items 18-20 (p. 52-56)

CONDUCTED AN ATHLETIC INTEREST SURVEY

SUFFICIENT INTEREST IN SPORT NOW CURRENTLY OFFERED TO FIELD A NEW TEAM(S) FOR GIRLS

DID THE DISTRICT TRY TO INCREASE INTEREST?

there were 55 schools which projected more sports for boys than girls. Of those 85 schools, ONLY 9 CONDUCTED AN INTEREST SURVEY. 46 SCHOOLS DID NOT EVEN RUN AN INTEREST SURVEY.

Of those nine schools which ran surveys, 7 FOUND INTEREST AND ONLY ONE SCHOOL TRIED TO GENERATE INTEREST.

EXHIBIT H-10
DATE 2-11-87
HB #399

Violations 2nd S/A- continued

IV. B. 2. m. - Publicity. A school district shall issue press releases and arrange for advertising giving equal emphasis to male and female sport activities. The school district shall make a good faith effort to encourage comparable coverage of female and male extracurricular sports in school-sponsored publications such as yearbooks and school newspapers...

SECOND Equal Athletic Self-Assessment Survey- Item 100 (p.20)
AFFIRMATIVE STEPS TAKEN TO INCREASE PUBLICITY FOR GIRLS' ATHLETIC EVENTS

60.8% HAD NOT TAKEN AFFIRMATIVE STEPS to increase publicity for girls' athletic events.

II. Intent of Settlement Agreement. The thrust and overall intent of this Settlement Agreement is to advance the opportunities which female high-school students have to participate in extra-curricular athletic events relative to their male counterparts.

SECOND Equal Athletic Self-Assessment Survey- Items 10-13 (p. 48-51)
DIFFERENCE IN TEAMS BY SEX AND SEASON FOR 1985-86 AND TOTAL TEAMS
DIFFERENCE BY SEX FOR 1985-86

54% projected MORE TEAMS FOR BOYS in 1985-86. (94 SCHOOLS)

10 schools did not answer and were not included in the data. 4 schools returned surveys with insufficient information. These 14 schools should be added to the 94 schools. (94+14=108 SCHOOLS)

59% is a possible projection of MORE TEAMS FOR BOYS in 1985-86 using data above.

It is important to note that this comparison includes football teams in comparison to girls' basketball or volleyball teams which means there is a great disparity in numbers of participants. (i.e. football teams-20-30 members and basketball and volleyball teams-10-12 members. This means even LESS COMPARABLE OPPORTUNITIES FOR girls versus boys if counted as individuals.

SECOND Equal Athletic Opportunities Self-Assessment Survey - Items 13-17 (p.51-52 & C-20 thru C-27)

PERCENT OF GIRLS BY SEASON FOR 1985-86 AND TOTAL PERCENT OF GIRLS PARTICIPATING IN 1985-86

The survey was tabulated by changing the individual data into a percentage for each school. This creates a false picture of participation. This does not take into consideration that Double AA schools have 50 % of the student population in Montana and C schools have only 13%. Therefore, a rating of 30% at a Double AA school would be offset by a rating of 100% at a C school. To accurately figure PARTICIPATION, one must use individual numbers of participants.

Using individual participation numbers submitted to the National Federation by MHSA and figures used by MHSA in newspaper releases our percentages are as follows:

FALL SEASON - Montana Boys' Participation- 7989
Montana Girls' Participation- 4683

Girls' Participating in the Fall Season = 36%

WINTER SEASON - Montana Boys' Participation- 7558
Montana Girls' Participation- 2316

Girls' Participating in the Winter Season = 23%

SPRING SEASON - Montana Boys' Participation- 4380
Montana Girls' Participation- 4020

Girls' Participating in the Spring Season = 47%

Girls' (Average) Participating in the Total Year 85-86 = 35%

It is obvious that the spring season with its equal sports, (track, golf, tennis) in traditional seasons, offer the most equal participation for girls. When we receive the actual raw data on participation from this survey we will be able to figure the percentages even closer.

IV. B. 1. f. MHSA Coaching Requirments. MHSA shall seek to assure that equal opportunity in the selection of and in the extension of coaching for both female and male students is provided and shall review and revise its rules in accordance with this requirement.

IV. B. 2. k. i. Coaches. A school district shall seek, endeavor to hire and where there are qualified persons available, hire comparable qualified persons as coaches for male and female extracurricular athletic teams....A school district shall develop written, objective and gender-neutral criteria to evaluate applicants for coaching positions, ...

IV. B. 2. k. ii. Coaches. A school district, if it has not already done so, shall develop written gender-neutral, objective criteria to evaluate the performance of all coaches hired by the district...

IV. B. 2. k. iii. Coaches. Each year the district shall evaluate head coaches by (a) utilizing the foregoing criteria,....

IV. B. 2. l. Coaching Salaries. A school district shall pay equal salaries for equal work by coaches of female and male teams.....

SECOND Equal Athletic Opportunities Self-Assessment Survey - Items 97-99 (p. 68-69)
HIRING CRITERIA FOR COACHING APPLICANTS
EVALUATION CRITERIA FOR CURRENT COACHES
COACHES OF GIRLS' TEAMS PAID LESS THAN COACHES OF BOYS' TEAMS

51.2% Indicated THEY HAD NO CRITERIA for coaching applicants.
24% reported THEY DO NO HAVE EVALUATION CRITERIA for current coaches.
37% PAID COACHES OF GIRLS' TEAMS LESS than coaches of boys' teams.

IV. B. 2. n.- Team Support. Within a school year and during the regular and tournament athletic season, a school district shall provide on an equal basis to male and female athletes any of the following types of support which it offers to either male or female extracurricular athletes during the school year: pep assemblies, school announcements, rosters, programs, pep band, cheerleaders and drill team. The school district or the band director may determine at which athletic events for males and females the band shall appear in satisfying the equal appearance requirement, providing that, at the end of the school year, the ban has played at the same number of regular season extracurricular athletic events of females as males.

SECOND Equal Athletic Opportunities Self-Assessment Survey - Items 101-103 (p. 70-72)
DIFFERENCES IN TEAM SUPPORT (CHEERLEADERS, BANDS, AND HALF-TIME PERFORMERS

64% projected MORE CHEERLEADER APPEARANCES at boys' events in 1985-86
52% projected MORE BAND APPEARANCES at boys' events in 1985-86
76% projected MORE HALF-TIME PERFORMANCES at boys' events in 1985-86

Including the 10 schools not answering the survey and those schools who returned surveys with insufficient information there is a possible percentage change to:

64% possible projection MORE CHEERLEADER APPEARANCES at boys' events in 85/86.
52% possible projection MORE BAND APPEARANCES at boys' events in 85/86.
76% possible projection MORE HALF-TIME PERFORMANCES at boys' events in 85/86.
(See C-115 thru C-117 for insufficient information #'s)

IV. B. 1. h. - Recruiting Efforts by MHSA. Where the same sport is sanctioned during different seasons for females and males, or where a female or male sport is played during a season different than the season played in a majority of other states playing such sport, MHSA shall participate with school district in improving recruitment opportunities for those athletes playing the sport in the off-season.

IV. B. 2. y. - Recruiting Efforts by School Districts. Where the same sport is sanctioned during different seasons for females and males or where female sports are played during seasons different than the season played in a majority of other states playing such sport, a school district shall participate with MHSA in improving recruitment opportunities for those athletes playing the sport in the off-season.

SECOND Equal Athletic Opportunities Self-Assessment Survey - Item 112 (p. 78)
AFFIRMATIVE ACTIONS INDICATING EFFORTS TO ENCOURAGE RECRUITING OF FEMALE BASKETBALL AND VOLLEYBALL PLAYERS

56% Indicated they HAD NOT TAKEN AFFIRMATIVE ACTION to encourage such recruiting. If the 9% returning insufficient information were added to this the projection would be:

65% possible projection NOT TAKING AFFIRMATIVE ACTION to improve girls' recruitment.

Violations 2nd S/A-continued

IV. B. 2. z. - Sex Equity Policy, Grievance Procedure and Coordinator.

A school district shall prepare, if it has not already done so, a sex equity in athletics policy, establish a grievance procedure and designate a coordinator for such policy and grievance procedure pursuant to the requirements of applicable federal law. The policy and information regarding the coordinator and grievance procedure shall be disseminated to its student body, faculty and parents.

Each school district shall keep on file for use by students and parents within their school district at least one copy of documents reflecting the MHSA and OPI grievance procedure as set forth hereafter, and as supplemented by other documents prepared by MHSA and OPI, as well as copies of ARM 10.6.101.et seq. and the Montana Administrative Procedures Act, SS 2-4-101 et seq., MCA.

SECOND Equal Athletic Opportunities Self-Assessment Survey- Items #18-25 (pg 79) ATTACHING DOCUMENTS, IDENTIFYING COORDINATORS, DESCRIBING HOW OTHER RELEVANT DOCUMENTS WERE DISTRIBUTED, AND IDENTIFYING THE LOCATION OF COPIES PERTINENT TO SEX EQUITY.

32% of schools DID NOT HAVE (supply) a sex equity in athletics policy.
28% of schools DID NOT DISSEMINATE the S/A to the student body.
17% DID NOT IDENTIFY their Title IX coocdinator.
28.5% DID NOT HAVE (supply) a Title IX grievance procedure.
11% DID NOT IDENTIFY the location regarding the Administrative Rules of Montana 10.6.101 et seq.
10.5% DID NOT IDENTIFY the location regarding the Montana Administrative Procedures Act 2-4-101 et seq.
6% DID NOT IDENTIFY the location of the S/A.

EXHIBIT H-(11)
DATE 2-11-87
#399

State of Montana

Proclamation

WHEREAS, women's athletics is one of the most effective avenues available through which American women can develop self-discipline, initiative, confidence and leadership skills; and

WHEREAS, early motor-skill training and enjoyable experiences of physical activity strongly influence life-long habits of physical fitness and contributes to emotional and physical well-being; and

WHEREAS, the communication and cooperation skills learned through athletic experience play a key role in the athlete's contributions at home, at work and to society; and

WHEREAS, the history of women in sports is rich and long, but there has been little national recognition of the significance of women's athletic achievements; and

WHEREAS, there is a need to increase the number of women in leadership positions of coaches, officials and administrators to ensure a fair representation of women's abilities and to provide role models for young female athletes; and

WHEREAS, the bonds built between women through athletics help to break down the social barriers of racism and prejudice.

NOW, THEREFORE, I, TED SCHWINDEN, Governor of the State of Montana, do hereby proclaim Wednesday, February 4, 1987, as

WOMEN IN SPORTS DAY

and encourage the citizens of Montana to observe the day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the GREAT SEAL OF THE STATE OF MONTANA to be affixed.

A 12
2-11-87
#399

Survey finds Montana women lacking in college preparation

GREAT FALLS (AP) — A national advocacy organization says a survey it recently conducted showed that young women in Montana aren't being prepared as well for college as are their male counterparts in the state.

"It doesn't seem that Montana is doing as well as some might expect in preparing women for college and graduating women," said Leslie Wolfe, director of the Project on Equal Education Rights based in Washington, D.C.

She said her organization is a division of the National Organization for Women Legal Defense and Education Fund and works toward improving educational opportunities for girls and women.

PEER's "1986 Report Card" was based on assessment of Scholastic Aptitude Test scores, college enrollment figures and types of college degrees awarded to women, Wolfe said.

She said the survey was intended to show how well high school girls are being prepared for college and careers.

Wolfe said the survey indicated that Montana's young women fare adequately in a few areas, but the state has a long way to go before achieving educational equality.

"Compared to the men in the state, they (women) are obviously not getting the kind of training men are getting," Wolfe said during a recent telephone interview with the Great Falls Tribune.

When compared with female students nationwide on math SAT scores, Montana females ranked sixth with an average score of 518, according to Wolfe.

However, she said, the average for Montana men was 579 on the math SAT — 61 points better than the women.

Therefore, she said, when that male-female difference in math SAT scores is compared with other states, Montana ranks 47th out of the 50 states and the District of Columbia.

Montana's female high school students are "scoring much too low" in relationship to male students, she said.

Wolfe said the survey also showed that:

- Montana ranks 47th out of 51 in the full-time enrollment of female students in public colleges and universities.
- Montana also ranks 47th in the number of bachelor's degrees awarded to women.
- And, Montana ranks 48th in the number of master's degrees awarded to women.

1/27/87 Motion

EXHIBIT I
DATE 2-11-87
HB #399

Chair Lory and Members of the House Judiciary Committee:

I am Maureen Jones, director of the Sex Equity in Vocation Education project in Western Montana and support full implementation of Sex Equity in Education, therefore I oppose HB 399.

Educators should be able to initiate and successfully integrate Sex Equity projects into their curricula. At the present time Montana ranks 48th in the nation in attendance of women enrolling in college immediately after graduation from high school. When they do attend college they are enrolling in academic areas which place them in traditionally low pay service careers. Math and science avoidance is a problem for girls in Montana high schools and as a result, the traditional careers they choose, force them into a cycle of poverty.

Research tells us that girls and boys who have the experience of receiving an equitable education have higher self esteem, select a career from a large selection of options and make academic decisions by personal choice rather then tradition.

Sex Equity in Education includes; use of non-sexist language, appropriate non-biased techniques in the classroom, non-biased counseling and balanced instructional materials.

Title IX has been successful for sports, but we need to see the same kinds of changes in the academic curriculum and to make sure this happens, we need rules to guarantee schools will accept their responsibility. The Human Rights Commission is the legal agency already responsible for preventing discrimination in housing and employment, therefore it is the logical agency to have the responsibility for Sex Equity in Education.

J
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#399

MONTANA STUDENT BAR ASSOCIATION
UNIVERSITY OF MONTANA LAW SCHOOL
MISSOULA, MONTANA 59801

WOMEN'S LAW CAUCUS

February 11, 1987

TESTIMONY IN OPPOSITION TO HB 399

Mr. Chairman and Members of the House Judiciary Committee:

My name is Anne Brodsky, and I am here today to speak on behalf of the Women's Law Caucus at the University of Montana School of Law, in opposition to HB 399. My testimony primarily focuses on the lack of need for this legislation, in light of existing statutory provisions with respect to agency promulgation of administrative rules.

As most of you know, the Montana Administrative Procedures Act (MAPA) sets forth a well thought out, extensive, and, most importantly, uniform process which all agencies must undergo before they may enact rules. The agency must have rulemaking authority; it must provide public notice and opportunity for hearing. If the agency promulgates a rule which does not conform to public comment, the agency must issue a "concise statement of the principal reasons for overruling the [opposing view]." Sec. 2-4-305(1), MCA. The rule must be consistent and not in conflict with the statute authorizing the agency's adoption of rules, and must also be reasonably necessary to effectuate the purpose of the statute. Sec. 2-4-305(6), MCA.

In addition to the detailed procedural requirements the agency must follow pursuant to MAPA in promulgating rules, the legislative Administrative Code Committee, holds many oversight powers over of agencies in their rulemaking process. The purpose of the ACC's oversight of the agency rulemaking process is to ensure that the agency does not exceed the authority granted to it by the legislature.

Specifically, the ACC may require a hearing on the agency's proposed rules (2-4-302(4) and 2-4-402(3)(c)); recommend adoption, amendment, or rejection of a rule (2-4-402(3)(b), MCA); request and obtain an agency's rulemaking records (2-4-402(3)(a), MCA); or institute, intervene in, or otherwise participate in the agency's proceedings (2-4-402(3)(d), MCA.

In fact, the ACC did review the Human Rights Commission's (HRC's) proposed rules. Staff for the ACC basically offered suggestions to the HRC staff on points of clarification in the proposed rules. It is my understanding that the HRC staff has incorporated those suggestions in its most recent draft of the proposed rules. Other than suggestions for clarification, the ACC staff found the proposed rules to be in conformity with the HRC's MANDATE to adopt procedural and substantive rules necessary to implement the Human Rights Act (Sec. 49-2-204, MCA).

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#399

The legislature's already-existing powers over agency rule-making does not stop here. Sec. 2-4-403, MCA, authorizes legislators, upon the objection to any rule by 20 or more members, to poll the members of the legislature to determine whether a proposed rule is consistent with the legislature's intent. Furthermore, if the ACC objects to a proposed or adopted rule, it may issue formal objections, and may publish those objections in the Montana Administrative Register. (Sec. 2-4-406, MCA.)

Ultimately -- and this statute is what makes HB 399 so perplexing -- the legislature already has power to repeal any rule adopted by an agency. The legislature may also direct the adoption or amendment of any agency rule. (Sec. 2-4-412, MCA.) I should also mention that the legislature does use its powers under this section, as with HB 696, in 1985, directing amendments of a rule promulgated by the Department of Revenue.

As I already commented, these powers of the legislature which are now available, are contained in a uniform body of law called the MAPA. Why would the legislature, whose ACC staff has already reviewed and found in conformity the proposed education equity rules here at issue, choose to confuse the codes, enact a special section of the law, and aim it at one particular type of rule by one particular agency? (Note, all other rules promulgated by the HRC would still be subject to the general requirements of MAPA. For example, the HRC has promulgated rules related to employment discrimination, insurance discrimination, and pregnancy discrimination.) This bill simply is unneccessary, as the legislature already has powers to oversee agency rule-making. One can only conclude that the legislation is proposed for purposes of harassing an agency that is attempting to do what the statutes and constitution require; that is, ensure that our educational institutions perform their functions without discrimination on the basis of gender.

I would like to point out a final mechanical matter with respect to this bill, which illustrates the lack of need for the legislation. The bill provides that before the HRC may adopt a substantive rule related to sex equity in education, the legislature must approve the rule. As you know, the HRC is now considering rules governing sex equity in education. Assume this legislature does not approve those rules (which it will not, since it is too late to introduce a bill to do so). Then those rules will be in limbo until a legislature, sometime in the future, approves or rejects them. (As I explained, if the HRC promulgated the rules, the legislature could repeal them at any time thereafter.) Should a sex discrimination charge in the area of education arise before a future legislature takes some action with respect to the proposed rules, the HRC will in all likelihood use the proposed rules as standards governing education equity. This can be assumed, since the purpose of the rules is to provide public notice of the agency's interpretation of the law in this area.

Thus, this bill, when analyzed in this respect, is shown to have

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no effect at all. The legislature already has power to repeal any agency's rules. To require legislative approval before the rule may be adopted is not to change the agency's interpretation of unlawful sex discrimination in education. The agency's interpretation will be as suggested in the rules. Thus, this legislation does not act to change the substantive law in the area of what constitutes discrimination in education. Rather, the legislation merely acts to prohibit the HRC from formally adopting rules as to its interpretation of the law. Since the purpose of rule adoption is to give the public notice of agency interpretation of the law, the effect of the bill merely is to thwart the opportunity for notice as to the legal standards governing interpretation of sex equity in education.

For these reasons, the Women's Law Caucus urges you give this bill a DO NOT PASS recommendation.

AMERICAN ASSOCIATION of UNIVERSITY WOMEN

MONTANA DIVISION

EXHIBIT K
DATE 2-11-87
HB #399

505 Sixth Avenue East
Kalispell MT 59901

09 February 1987

The Honorable Earl Lory, Chairman
Judiciary Committee
Montana House of Representatives
Capitol
Helena MT 59620

Dear Chairman Lory and Members of the Judiciary Committee:

The State Board of Montana Division, AAUW, discussed H.B. 399 and H.B. 400 at its meeting yesterday.

Montana Division, AAUW, recognizes the importance of the Human Rights Commission and opposes any attempt to weaken its authority.

Montana Division, AAUW, opposes H.B. 400.

Sincerely,

Mary Gibson

Mary Gibson, President
Montana Division, AAUW

L
2-11-87
#399

TESTIMONY OF JOHN G. FRANKINO

In opposition to HB399

My name is John G. Frankino. I am presently a mathematics teacher at Capital High School, head girls' basketball coach, assistant boys' basketball coach, a member of the state's advisory committee on sex equity, and a former chair of the Human Rights Commission. I am sorry I am not able to present this testimony in person.

I believe the Montana Human Rights Commission is the proper body to process education equity cases in Montana and to make rules necessary to that end. The Commission has the experience in case processing and the expertise in discrimination law to accomplish the tasks of providing a remedy to aggrieved individuals and promulgating rules explaining what can constitute sex discrimination in eduaction. No other state agency has this experience in discrimination law.

It is argued that these rules are duplicative. As a high school teacher and a coach, I am convinced that there is enough sex discrimination in education to go around for everyone.

ex-M
Date 2-11-87
HB #399

My name is Dr. John W. Kohl, Dean-College of Education, Montana State University. I would like to offer written testimony in opposition to H.B. #399.

before the:

House Judiciary Committee
(Rep. Earl Lory, Chair)

I offer the following points to <u>refute</u> the need for H.B. #399.

No precedent for a bill of this nature that restricts a federal title on human rights.

It will be difficult, if not impossible, to be in compliance with a law that has no guidelines.

Its an unnecessary intrusion by the legislature in an area it should be supporting, not hindering.

The guidelines issued by the Montana Human Rights Commission are essential in helping agencies meet their legal obligations.

The accreditation standard that governs education agencies is so general it is virtually unenforceable and meaningless.

N
2-11-87
#399

Janice K. Whetstone
Attorney at Law
215 West Mendenhall
Bozeman, MT 59715

February 9, 1987

House Judiciary Committee
Montana State Legislature
State Capitol Building
Helena, MT 59620

Re: House Bill No. 399

Dear Committee Members:

I, as an individual, have had an opportunity to review House Bill No. 399. As you are aware, this bill relates to the requirement of legislative approval of administrative rules implementing the Montana Human Rights Act that prohibits sex discrimination in education. I am very concerned about the implications of this bill.

It is my understanding that such legislative approval is not required for the implementing of any other administrative rules. I believe that the original act that prohibited sex discrimination in education was very clear as to its intention and that there should be no need for the full approval of both houses of the legislature to implement the necessary administrative rules.

The ultimate effect if this bill actually becomes law is to make it impossible to enact the administrative rules necessary to implement the provisions of the act. I believe that it would be extremely difficult if not impossible to garner the full approval of both houses and that requiring such approval merely acts to delay the implementation of the administrative rules to the detriment of the effected parties.

I believe that the thrust of the act that prohibits sex discrimination in education needs to be immediately implemented. I have had an opportunity to work with young women in grades 7 through 12 as part of the Expanding Your Horizons program in Bozeman. I have acted as both a presenter and as part of the organizing committee in regards to this program. I have been appalled to find that there is still a prevailing attitude with many of the young women in our State that there are "appropriate" careers for them to pursue and in many instances these jobs do not include those that which are traditionally

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#399

male. I believe that this attitude continues to prevail because of continuing sex discrimination in education and the programs which are presented to these young women as opposed to those presented to young men in the same educational system.

I have further had an opportunity to work as a presenter on behalf of the Womens' Section of the State Bar of Montana in making presentations to Girls State. I have been involved in this activity on a variety of levels since 1980. Again, this has provided me with an opportunity to meet young women from across the State of Montana. These contacts have confirmed what I have found to be true with the young women in Bozeman. They believe that there are appropriate positions for them in life and that these do not include jobs which are considered to be traditionally male.

Many of these young women have indicated to me that sex discrimination continues to occur in both a subtle and open manner in their educational systems.

In conclusion, I again emphasize to you that I do not believe that the passage of House Bill No. 399 will forward the concerns that lead to the passage of the Montana Human Rights Act prohibiting sex discrimination in education. I believe that it will only serve to delay the implementation of that policy and fail to provide the young women of our State with the encouragement and backing of all of us to reach for their highest potential in whatever activity, be it academic or athletic. Our State is at its very strongest when all of its citizens have the opportunity to reach their fullest potential in all endeavors.

I thank you for your attention to my comments on this Bill.

Very truly yours,

Janice K. Whetstone

JKW/lb

TESTIMONY IN SUPPORT OF HOUSE BILL 400

A
DATE 2-11-87
HB #400

From: Bozeman Landlord's Association

To: The Judiciary Committee

Mr. Chairman, members of the committee, my name is Larry Witt, and I reside at 1601 West Olive in Bozeman. I am president of the Bozeman Landlords' Association. Our Association is supporting HB 400.

We feel that Human Rights Commission Rule 24-9-1107 is both vaguely written and lacking in some important exemptions. In an age of increasing litigation such vague language will only breed more lawsuits. Just what constitutes age discrimination needs to be spelled out in detail. Many questions exist with the rule as it is written: such as, "Is allowing a maximum number of people to live in an apartment permitted?" I have allowed only two people in some of my apartments and advertise that only two people are permitted. I have rented to a single parent with a child but not to a couple with a child. Is this discrimination? I like to keep the wear and tear to a minimum, and keep the noise level down. In a college town I have found this to be a necessary practice. Would it now be illegal?

If two sets of tenants want to rent an apartment and their qualifications are equal, I would prefer a couple over a couple with a child. One less person means less noise and less wear and tear. Is this discrimination?

An exemption is clearly needed when a condition exists where something on or a part of the property is considered safe for adults, but not for children. We have laws setting minimum ages for driving, for drinking, and for voting because of the maturity needed to do these things. Age and more specifically maturity are important factors to a landlord in selecting his tenants.

As an example, an outside staircase and deck may be safe for an adult but would be dangerous for a child to play on. The landlord can tell them not to play on the staircase or deck. The parents can tell them not to play, but... some will still play on them. And... when the child falls and gets hurt, the parents will sue the landlord, and the attorney for the child will argue that the child lacked the maturity to know better... and thus the landlord will be at fault.

Outside decks, and open lofts, swimming pools, and duck ponds, and meandering streams might be considered wonderful amenities in an apartment complex, but they also pose potential danger to small children. <u>The landlord needs the right to determine how much risk he is willing to take and set his own guidelines and age limits for children.</u>

EXHIBIT

EXHIBIT B
DATE 2-11-87
HB # 400

24.9.1107 REAL PROPERTY TRANSACTIONS; AGE DISCRIMINATION. (1) Section 49-2-305(1), MCA, which prohibits discrimination in housing on the basis of age shall cover refusal to sell, rent or lease a housing accommodation or improved or unimproved property because of the age of a person residing with the buyer, lessee, or renter.

(2) Restricting sale, rental or lease of a housing accommodation to persons of a certain age group or requiring that persons residing with the buyer, lessee, or renter in the housing accommodation belong to a certain age group when such accommodation is authorized, approved, financed, or subsidized in whole or in part for the benefit of that age group by a unit of the federal government shall not constitute a violation of subsection (1).

(3) Restricting sale, rental, or lease of a housing accommodation with specialized facilities, services, or environment to the specific age group requiring those specialized facilities, services, or environment shall not constitute a violation of subsection (1).

(4) The effective date of this rule is July 1, 1987.

EXHIBIT

C

NAME: BOB HELDING DATE: 2-11-87

ADDRESS: 2328 CLOVERDALE, MISSOULA, MT. 59803

PHONE: 251-2891

REPRESENTING WHOM? MT. ASSOC. OF REALTORS

APPEARING ON WHICH PROPOSAL: HB 400

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: The ability to utilize your own property the way you desire is a privileged right.

Many elderly people desire to live in an area or building when it is quiet.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

D

STATEMENT OF JACK M. McLEAN, MONTAN HUMAN RIGHTS COMMISSION MEMBER OPPOSING HOUSE BILL 400

2-11-87

HB # 400

I am Jack M. McLean, a member of the Montana Human Rights Commission, and appear before this committee to testify in opposition to House Bill No. 400. I believe the purpose of this bill is to permit landlords to discriminate against tenants with children. Although I neither support nor oppose that policy, I do not believe this bill is the appropriate way to achieve that policy.

House Bill 400 would repeal Rule 24.9.1107, Administrative Rules of Montana, which has an effective date of July 1, 1987. In order to appreciate what that administrative rule would do, and why it was promulgated, I believe it is important to the review the history of that rule.

HISTORY OF ADMINISTRATIVE RULE

In May of 1985 various low income groups in Montana approached the Human Rights Commission and asked them to adopt an administrative rule which would prohibit landlords from discriminating against tenants with children. Many landlords in the State of Montana, for various reasons, refused to rent premises to any tenants with children. These low income groups believed that such actions were contrary to the Montana Human Rights Act and asked us to adopt a rule clarifying the act.

The Montana Human Rights Commission instructed its staff attorney to research pertinent language of the Montana Human Rights Act which reads as follows:

49-2-305. Discrimination in Housing.

(1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, or other person having the right to sell, lease, or rent a housing accomodation or improved or unimproved property:

(a) to refuse to sell, lease, or rent the housing accomodation or property to a person because of sex, race, creed, religion, color, age physical or mental handicap, or national origin; . . .

EXHIBIT D
2-11-87
400

(Emphasis added.)

The courts are instructed by the Montana Human Rights Act to strictly construe this language:

49-2-402. "Reasonable" to be strictly construed.

Any grounds urged as a "reasonable" basis for an exemption under any section of this chapter shall be strictly construed.

In researching this bill, our staff attorney found no legislative history whatsoever to guide the Human Rights Commission in deciding what the intent of the Montana Legislature was when this portion of the act was passed in 1974. Likewise, the Montana Supreme Court had never interpreted this language. Thus, our staff attorney was forced to look to court decisions of other states to see how they had interpreted similar legislation.

No legislation from other states was found which was identical to the Montana Human Rights Act. However, other courts have interpreted very similar language to mean that a landlord was prohibited from discriminating against a tenant with children.

In August, 1985, the Montana Human Rights Commission adopted the following administrative rule:

24.9.1107 REAL PROPERTY TRANSACTIONS: AGE DISCRIMINATION.

(1) Section 49-2-305(1), MCA, which prohibits discrimination in housing on the basis of age shall cover refusal to sell, rent or lease a housing accommodation or improved or unimproved property because of the age of a person residing with the buyer, lessee, or renter.

(2) Restricting sale, rental or lease of a housing accommodation to persons of a certain age group or requiring that persons residing with the buyer, lessee, or renter in

the housing accommodation belong to a certain age group when such accommodation is authorized, approved, financed, or subsidized in whole or in part for the benefit of that age group by a unit of the federal government shall not constitute a violation of subsection (1).

D
2-11-87
400

(3) Restricting sale, rental, or lease of a housing accommodation with specialized facilities, services, or environment to the specific age group requiring those specialized facilities, services, or enviroment shall not constitute a violation of subsection (1).

(4) The effective date of this rule is July 1, 1987.

Most of the commissioners agreed that the 1974 Legislature probably did not envision the Human Rights Act as prohiting landlords from discriminating against tenants with children. However, this was speculation on our part, and certainly not something upon which we could base a decision. We felt certain that if this language were interpreted by the courts, that they would rule that the "clear meaning" of the statute was that a landlord could not discriminate against a tenant with children. Thus, we felt obligated to adopt an administrative rule that would prohibit landlords from discriminating against tenants with children.

DELAYED EFFECTIVE DATE OF RULE

Most of the members of the Montana Human Rights Commission expected that if the Commission, or any court, interpreted this statute to preclude a landlord from discriminating against a tenant with children, that the statute would be amended to legalize such action. We also felt strongly that public policy as important as this should be decided by the legislature, and not an administrative body. We wanted to give the Legislature an opportunity to express its intent before this administrative rule went into effect. For that reason, the effective date of the rule was made July 1, 1987, although the rule was adopted in August of 1985.

D
2-11-87
400

LEGISLATURE SHOULD CLARIFY POLICY

I, and the Montana Human Rights Commission, take no position on whether the Montana Human Rights Act should or should not prohibit a landlord from discriminating against a tenant with children. However, the Montana Human Rights Commission feels that if the Legislature does not wish to prohibit a landlord from discriminating against a tenant with children, that the statute itself should be amended.

A case is now pending in the Montana Human Rights Division which will require the Montana Human Rights Commission to decide whether or not a landlord can discriminate against a tenant with children. Repealing ARM 24.9.1107 and prohibiting the Commission from adopting any similar rule without legislative approval will not clarify the intent of the discrimination in housing statute. Rather, it will just require the Montana Human Rights Commission to interpret the discrimination in housing statute when a case comes before it.

If this committee decides that it does not want to prohibit a landlord from discriminating against a tenant with children, I, and the other members of the Montana Human Rights Commission, urge the committee to amend the discrimination in housing statute. I would suggest the following language be added to that statute:

> (4) Nothing in this section shall prohibit an owner, lessee, manager, or other person having the right to sell, lease, or rent a housing accommodation, or improved or unimproved property from refusing to sell, lease, or rent such property to a person with children.

SUMMARY

In summary, we believe the Montana Legislature is the appropriate forum for debating and deciding whether or not

landlords in Montana should be prohibited from discriminating against tenants with children. We would urge you to clarify the legislative intent of the discrimination in housing act by addressing the underlying statute, rather than just repealing the administrative rule.

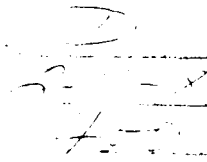

EXHIBIT E
DATE 2-11-87
HB 400

Marie Schreiber / CCC
Great Falls

(opposing H.B. 400) 2-11-87

Mr. Chairman and members of the committee,

My name is Marie Schreiber, I have 4 children. I live at 1508 1st west Hill Dr. G.F. When I was looking for a home to rent for my family I kept reading ads requesting no pets or children, or pets but no children. My children did not understand why they were not wanted, frankly neither did I.

Children are people, they deserve a comfortable place to live with their families.

Low-Income people were instramental in developing an age discrimination housing bill. H.B. 400 is a slap in our faces as it turns the wording around enabling age discrimination to continue at a greater degree.

I question the morality of this bill. It seems to promote splitting families or segregating families who rent as if they were aliens. Children are our future, we must allow them to grow into that future with their self esteem in tact.

Thank you.

EXHIBIT

EXHIBIT F
DATE 2-11-87
HB #402

February 11, 1987

Mr. Chairman and committee members

My concern is based on personal experience in trying to find safe affordable housing for my three children and myself. While looking through the want ad section, several homes for rent looked very appealing. One stipulation seemed to reappear. an example - 3 or 4 bedroom home for rent: no pets - no children. Homes which were available - almost always put people like myself on a fixed income in the worst or most neglected neighborhoods. This type of action to me is terribly unjust. Children should not be made to suffer because of an economic status they have no control over, or because of their age..

EXHIBIT

(4) TWO SIDES PLEASE NOTE

EXHIBIT G
DATE 2-11-87
HB #400

2/11-87 Testimony
(H.B. 400) age discrimination on House

I Oppose H.B. 400 for one Reason
because discrimination is is any form
even is Providing Shelter. When it Happ.
to People, they deserve a Quick Remedy
there not enough of Good Housing
Without Putting Restrictions on it -
there a lot of Land Lords that won't
Rent to People if they got Kids Cause
they figure they will destroy the
Structure, I my self at one time
managed apt. / adult are just
as bad, at times because I know.
So I am Opposing H.B. 400

Thank You
Lois M Lumsden
B.C.U. also
on Bd
of Directors,

So I hope You will
Study this carefully
and Give a fair Decision,

EXHIBIT 4
DATE 2-11-87
HB 400

2/11/87

Testamoney:

Ag dis. Housing. Bid 400

I Think the Reason Why they are doing this is Because. they dont think they are going to Get there Money if. they Keep doing this they Will Lose a Lot of Money. on these places They pick Who They. Want That is. Wrong. I dont think they Could Put the Poor out There are places I See. You Cant even Smoke,

Jacqueline CampBell

EXHIBIT

EXHIBIT I
DATE 2-11-87
HB 400

Mr. Chairman and Committee,

My name is Babbette Narry, I reside in Greatfalls. I live in a run down shack of a house, thats on the verg of being Condemned. My Land Lord comes by and gets the rent money and won't fix anything.

I've been looking for another place, but what stops me is the advertizement in the newspapers, 2, 3, 4, or 5 bedrooms for rent, but Adults Only, No Kids!

Now how are you suppose to get out of a bad situation, if you have no place to go!

Thank you

Babbette Narry

(opposing HB. 400)

EXHIBIT J
DATE 2-11-87
HB 400

Honorable Committee Members

My name is Lydia Jo Lindberg, I now reside in Parkdale, a housing project in Great Falls. I am the mother of a two year and a five year old. We have lived in Parkdale for almost four years. Never the less we have a dream of living in a house, one that we could afford! On my income that's not an easy task.

Children have a right to live with the same opportunities as anyone else! It's inhumane to discriminate in such a way, to this portion of our population. The welfare of our children should be our top priority. They are our future!

Lydia Jo Lindberg
398 Parkdale
Great Falls, MT 594

(opposing H.B. 400)

EXHIBIT

EXHIBIT K
DATE 2-11-87
HB 400

Mr. Chairman and Members of the Committee:

My name is Denise Byrd. I reside in Great Falls. Because of my daughters, I am eligable to receive $354.00 per month. Out of this money I have to pay $200.00 per month to rent an old run down house that we have lived in for over a year now. We are not a flighty family and do not move very often. Other than normal wear and tear we have never been accused of destroying anyones home.

I have just recently found out that it takes 18 months or more to get any HUD housing or Section 8 housing. In the meantime we have to pay outragous rents on dumps. Most of the nicer homes in our area are either too expensive or children are not allowed.

How are we suppost to raise our children in decent homes if landlords discriminate against all children because of what some parents allow their kids to do.

THANK YOU

Ms. Denise M. Byrd

(Opposing H.B. 400)

EXHIBIT 6
DATE 2-11-87
HB #400

Mr. Chairman

My name is Wilbur Johnson. I am with the Concerned Citizens Coalition from Great Falls. I am here in ~~favor~~ opposition of House Bill #400 I do not think that there should discrimination of any kind in housing. Families should not be penalized for having children when it comes to renting.

When I was senior resident manager discrimination was not allowed in the low income housing. It should not be allowed in any rentals. - I oppose HB 400

Thank you,
Wilbur L. Johnson

therefore I believe.

Legislative approval is to lengthy to deal with something as ugly as age discrimination

EXHIBIT

EXHIBIT M
DATE 2-11-87
HB 400

WITNESS STATEMENT

NAME Sandy Chaney BILL NO. 400

ADDRESS P.O. Box 1099 Helena DATE 2/11/87

WHOM DO YOU REPRESENT? Women's Lobbyist Fund

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WOMEN'S LOBBYIST FUND

Box 1099
Helena, MT 59624
449-7917

February 11, 1987

EXHIBIT 4
DATE 2-11-87
HB # 400

Testimony on HB 400

Mr. Chairman and members of the committee:

My name is Sandy Chaney and I'm here today on behalf of the Women's Lobbyist Fund to express our opposition to HB 400. In the fall of 1985, the WLF adopted a Women and Families Economic Agenda for the 1987 Legislature. This bill falls within the principles of that agenda because its intent may be to limit the availability of housing options to families with children.

The Montana Human Rights Act prohibits discrimination on the basis of age. Unlike the federal laws that prohibit age discrimination, the Montana Act does not limit to older persons the categories of those protected by the Act. The prohibitions against age discrimination cover persons of any age, young as well as old.

In spirit with the Human Rights Act, housing accomodations should not be limited on the basis of age. Restricting housing that is available to single mothers or families with small children merely because of the age of the children is blatantly in violation of the very purpose of the Human Rights Act. Individuals should be treated as individuals, and should not be judged on the basis of a particular classification such as age. Landlords may screen potential tenants for their compatibility with the leasing requirements imposed by the landlord. However, some classifications on which to base tenancy restrictions are not permissible in the Human Rights Act. Age is one of these categories.

As with our testimony against HB 399, Women's Lobbyist Fund opposes HB 400 because the procedural requirements set forth in the bill appear to create an unnecessary exception to the general procedural methods for rule adoption under the Montana Administrative Procedures Act. Because the legislation is unnecessary, we also urge the committee to oppose HB 400. Thank-you.

Exhibit

N
2-11-87
#400

Montana Catholic Conference

February 11, 1987

REPRESENTATIVE LORY AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

I am John Ortwein, here today representing the Montana Catholic Conference. The Montana Catholic Conference serves as the liaison between the two Roman Catholic Bishops of the State of Montana in matters of public policy.

We are here today in opposition to HB 400.

The US Congress declared in the Housing Act of 1949, Section 2, that "the housing policy of this country...is a decent home in a suitable invironment for every American family." The Catholic Bishops of the U.S. issued a statement on housing in 1975. "The Right to a Decent Home" pointed out the disproportionate suffering from lack of housing by certain groups in our society. Although it has been morethan a decade since the bishops' statement was issued their observations about the disproportionate suffering of the poor and special problems of the elderly are still relevant today.

It would seem to us that the removal of Section 4 from the present law will cause further discrimination to the housing problems already confronted by the poor and the elderly.

The Montana Catholic Conference would urge a "no"vote on House Bill 400.

Tel. (406) 442-5761 P.O. BOX 1708 530 N. EWING HELENA, MONTANA 59624

CARE & SHARE

EXHIBIT A
2-11-87
HB 495

AMENDMENT TO HOUSE BILL 495:

(1) Page 1, Line 10, following "(1)"
Strike: "(a)"

(2) Page 1, Line 11, following "if,"
Strike: "knowing"

(3) Page 1, Line 12
Strike: "that he has no legal right to do so,"
Insert" "(a)"

(4) Page 1, Lines 16, 17 and 18
Following: "(b)"
Strike: lines 16 and 17 in their entirety and line 18 through "committed"
Insert: "Prior to the entry of a court order determining custodial rights"

(5) Page 1, Line 20, following "parent"

Insert: "where the action manifests an intent to substantially deprive that parent of parental rights"

(6) Page 1, Line 22
Following: "court"
Strike: "decree, the offense of custodial interference is"
Insert: "order,"

(7) Page 1, Line 23
Following: line 22
Strike: "committed"

(8) Page 1, Lines 24 and 25
Following: "other"
Strike: the remainder of line 24 and line 25 in its entirety
Insert: "where the action manifests an intent substantially to deprive that parent of parental rights."

EXHIBIT B
DATE 2-11-87
HB # 495

House Bill - 495

Is House Bill 495 for real? It appears to me to be highly unconstitutional because it creates absolute liability! It eliminates the requirement that intent be proved.

You can't have people in jail without proving intent - especially for long periods.

Because there are no circumstances constituting an exception as non-existent the Statute doesn't give court attorneys any discretion!

And this offense is to be classified as a felony —! While our prisons, of necessity, are releasing rapists, murderers, and other criminals

EXHIBIT 6
DATE 2-11-87
HB 495

In Montana alcoholism is a problem! Many custodial parents deny visitation due to alcoholic circumstances. Many of us do this to protect our children - Our we to be sent to prison for trying to protect our children.

Furthermore, many custodial parents use visitation interference as a leverage to get child support. This may not be ethical - But is it ethical to leave children without the basics of food + shelter. The Bureau of Child Support has helped this situation but the problem still looms large. Approximately 150,000 children + women are living below the poverty level in Montana. Child support has to be 30 days,

EXHIBIT B
DATE 2-11-87
HB # 495

to wait. It's time
child to wait 30 days for
there are about 35,000
a Child Enforcement Bureau, another
200 non-AFDC cases - so as you
can see child support payments remain
a tremendous problem in Montana

And how you propose a
$50,000 fine + ten years in
prison to a custodial parent
who may be denying visitation to
get those necessary funds to
feed her children.

I Kindly ask you to consider
this issue fully - and, if you
do, I believe you will vote
against this bill.

Sincerely,
Jana A. Dias
Helena, Montana
442-4496

EXHIBIT C
DATE 2-11-87
HB # 495

2-11-87

Mr Chairman and members of the committee:

My opposition is mainly to H.B 284 which I understand is tabled at this time.

I can only give you personal reasons why this bill should not be passed.

As a divorced mother with 2 children, I am concerned as to the vagueness of this bill. Currently, my ex-husband is serving 40 years as a dangerous offender in the Montana State Prison for raping little children. (eligible for parole in 7y
The court would not terminate parental rights nor did the court terminate visitation.

In the best interest of the children, I have not allowed them to visit with their father at the prison. I am concerned that if this bill passes and he chooses to file charges, that I would end up in prison serving longer for denying visitation than he did for raping little children!

HB 283 I am also concerned about the moving out of state. I am remarried; should my husband find a job out of state - am I to remain behind because while my ex husband is in prison, still has visitation and refused to agree that we (the child move?

The question is - What is in the best interest of the children involved, who pays?

Is H.B. 495 an addendum to H.B. 284?

While I agree there are many divorced parents who refuse visitation because of animosity toward each other - and something should be done; I feel this bill is too extreme and should not be passed.

Thank you.

Rebecca C. Atkins
2655 Valley Dr.
E. Helena, MT 59635

EXHIBIT D
DATE 2-11-87
HB #495

February 8, 1987

The Bill Concerning Child Visitation and The Fine and Imprisonment of the Custodial Parent.

As the custodial parent of an eleven year old boy, I feel I must say something about the problems concerning child visitation and the emotional stress that involves all of the parties. I will cite just a few problems that arise, although there are many more.

Have you considered the fact that at times the non-custodial parent comes to get the child in an inebriated condition, or any other condition that may be detrimental to the care and safety of the child?

Have you considered that the child may have other plans and that he or she may not want to go with the non-custodial parent on that particular day?

Have you considered that visitation must be agreed upon by both parents? This is another problem when the non-custodial parent shows up without the consent of the custodial parent.

Have you also considered Exhibit

the emotional trauma the children will face if the custodial parent is fined and imprisoned?

My question is, why are you wasting the taxpayer's money on ~~such~~ such nonsense? Why are there no penalties when the child support payments are continually late? Should there not be a heavy fine and imprisonment on this latter issue?

Please stop wasting our time and money and get to the real issues!

Celeste Hollingsworth
845 Terrence Road
Helena, 59601

A
2-11-87
#567

* *

AN EVALUATION OF PROPOSALS TO ELIMINATE THE COLLATERAL SOURCE RULE

* *

Prepared by the Montana Trial Lawyers Association

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567

I. INTRODUCTION

In Montana, the collateral source rule provides "that a payment to [an injured victim] from a source wholly independent of and not in behalf of the wrongdoer cannot inure to the benefit of the wrongdoer to lessen the damages recoverable from him, and the evidence of such payment is inadmissible". Goggans v. Winkley, 159 Mont. 85, 92, 495 P.2d 594, 598 (1972). Thus, the rule is predicated upon the general notion that the wrongdoer should not benefit because a victim has been prudent enough to buy her own insurance or because he or she is fortunate enough to have friends or relatives who are willing to provide valuable services without pay during a time of need.

This rule is now under attack. The general argument advanced is that the rule allows the victim to be paid twice for damages such as medical expenses covered by insurance and thus, provides the injured party with a "windfall". The proponents of change also maintain that evidence regarding collateral sources should be presented to juries to reduce awards. Close analysis of the situation, however, shows the following:

> (1) Even with the collateral source rule, the victim rarely, if ever, receives a "windfall", and indeed, is not fully compensated for losses;
>
> (2) In fact, elimination of the collateral source rule will only further deprive an injured victim of full compensation; and
>
> (3) Elimination of the rule will have adverse social consequences. It will create a "windfall" for the insurance industry at the expense of the victim.

(4) Moreover presenting collateral source evidence to juries will distract from the major issues and will create confusion for the juries. Thus, it will waste court resources and will jeopardize the victim's opportunity to obtain a fair trial.

Each of these points are discussed in detail below.

II. DISCUSSION

A. THE VICTIM IS NOT FULLY COMPENSATED UNDER THE CURRENT SYSTEM.

First, the victim rarely receives "double recovery" for his losses because the expenses of modern litigation far exceed anything he can recover through the collateral source rule. Expert medical testimony, for instance, often costs thousands of dollars. Indeed, physicians who charge only $25 to their patients for an office visit, often charges the same patient $250 or even $500 per hour if they have to assist them in litigation. Some physicians have, in fact,charged their patients over $700 per hour for testimony related to their injuries. Nonmedical expert testimony is just as expensive. Other litigation costs and attorney fees leave the victim with a net recovery of approximately 60% or less of his overall damages, since none of these expenses are recoverable under current laws. The value of the victim's compensation is further diminished because the wrongdoer or his insurance company is not required to pay any interest on the amount owed between the time of the injury and the date of entry of judgment, a period which usually exceeds two years and sometimes exceeds a half a decade.

The amount the victim recovers through the application of the collateral source rule is far less than his overall litigation expenses in virtually every case. This, as a practi-

cal matter, eliminates any opportunity for the victim to be compensated twice and thus, to obtain a "windfall" or "double recovery" as you are now being told.

On the other hand, the collateral source rule serves as a practical device for the injured party to recoup, at least, part of his non-compensable litigation costs and interest. This, of course, furthers the public policy that all injured persons should be fully compensated under the law.

B. ELIMINATION OF THE COLLATERAL SOURCE RULE WILL ONLY FURTHER VICTIMIZE THE INJURED PARTY.

As shown above, in virtually every instance, litigation costs exceed any benefit derived from the collateral source rule. If the rule were eliminated, the victim would receive an even smaller percentage of his overall lawful damages than he is receiving at the current time. Thus, elimination of the rule does more harm than it does good.

C. ELIMINATION OF THE COLLATERAL SOURCE RULE WILL CREATE A "WINDFALL" FOR THE INSURANCE INDUSTRY.

As stated above, the collateral source rule benefits those that are prudent enough to purchase their own insurance. This insurance, of course, does not come free. The insured person pays a premium for it. The insurance company takes money from this person to undertake the risk that there is going to be an injury. When the injury occurs, all the insurance company is doing is paying for the risk it has underwritten. In other words, it is simply fulfilling its contract. The collateral source rule allows the victim to, in effect, recover some of the

premium he or she has paid over the years to be covered for these risks. In that sense, the victim does not receive any "windfall" at all. He is simply getting what he paid and bargained for.

The party that receives the windfall is the insurance company that has received premiums from the negligent party. It gets to keep the premiums the negligent party has paid to it, but does not have to pay for the risk caused by the negligent party's actions. Certainly, this is unfair to both the victim and to the negligent party, who have paid premiums to be covered for these risks.

D. PRESENTING COLLATERAL SOURCE EVIDENCE TO THE JURY..

There are still other problems. Those that advocate eliminating the collateral source rule also want the jury to be presented with evidence concerning who made collateral payments, how much was paid, when they were paid, whether or not they will continue to be paid in the future, and so on. The purported objective of such evidence is to allow the jury to offset the total amount of damages by the amounts expected to be paid by collateral sources.

If the jury is going to be allowed to hear this evidence, however, should not it also be allowed to hear evidence concerning how much the victim has previously paid out in premiums in order to be compensated with collateral insurance benefits? Should not it also be allowed to know that between the time of the injury and the time of judgment, the victim receives no interest on the amounts due to him in compensation? Moreover, shouldn't the jury be allowed to know that litigation costs,

including expert witness fees, many deposition and investigative costs, and attorney fees will not be paid by the wrongdoer, but will have to be paid out of the verdict? In other words, if we are going to allow a jury to reduce the verdict by considering collateral benefits, shouldn't we also allow it to increase the verdict by considering all of the expenses that reduce the net recovery?

The current collateral source rule, which prohibits a jury from considering evidence of collateral sources of payment is predicated partially on the notion that "collateral matters involving transactions between others" only confuse the issues, wastes the jury's and court's time, and leads to consideration of matters which are no business to the wrongdoer or his insurance company. See Goggans, supra. This underpinning of the rule is probably more applicable now than it was in the past. If our aim is to streamline our judicial system in terms of both time and money and also to further the public policy of just compensation for injuries, then we should resist any attempts to make drastic changes in the current rule.

III. SUMMARY AND SUGGESTED SOLUTION

In summary, the collateral source rule, at least, provides the victim with a partial set off for his or her litigation costs. In the vast majority of the cases, however, collateral benefits do not even approach overall costs, and thus, their elimination would only compound the problem of incomplete compensation. Moreover, abolishing the rule would only create a "windfall" for insurance companies that have received premiums,

EXHIBIT 4
DATE 2-11-87
SB 7

but will be able to escape risks they have insured for. Furthermore, presentation of collateral source evidence to a jury without consideration of expenses that reduce the net amount the victim will recover would be unfair. It would also confuse the major issues the jury must decide and cause unnecessary drains on the court's resources.

Thus, at best the collateral source rule should be modified and not eliminated. If it is to be changed, it should accomplish only the following:

> (1) Apply only in those rare situations where the victim really does receive a "double recovery (i.e. where collateral sources exceed litigation expenses).
>
> (2) Require the negligent party's attorney to petition the court for a reduction in the verdict or settlement if a "double recovery" is expected. In this way, judicial resources and moneys are not wasted in the vast majority of cases where "double recovery" does not occur.
>
> (3) Let the Court--not a jury--decide what the appropriate setoff should be. To do otherwise is, again, a tremendous waste of time and money. The confusion and complexity it will generate will also jeopardize the ability to get a fair trial.

A proposed amendment, tailored to achieve these fair objectives, is attached.

EXHIBIT A
DATE 2-11-87
HB 567

_____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF THE

A BILL FOR AN ACT ENTITLED: "PREVENTION OF DOUBLE RECOVERY".

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. A new section should be enacted to read:

Declaration of policy. It is the policy of this state that all persons injured through the fault of another should receive full compensation for all injuries defined under the law and that the wrongdoer should not benefit at the victim's expense. It is also the public policy of this state that a person should not receive more than his just and lawful compensation, after consideration of costs and expenses incurred to recover lawful damages. This Act is designed to promote these policies.

Section 2. A new section should be enacted to read:

Definitions. The following words, as used in this Act, shall have the meaning set forth below, unless the context clearly requires otherwise:

(a) "Claimant" means any person who brings a

personal injury action. When the action is brought on another's behalf, the term "claimant" includes a guardian, parent, personal representative, or whoever is acting in the representative capacity of the injured party.

(b) "Collateral sources" are sources of compensation paid or given to the claimant for damages by someone other than the wrongdoer.

(c) "Litigation costs" mean all reasonable and necessary costs and expenses incurred by a claimant to recover lawful damages, including but not limited to, witness fees, investigation costs, expert fees, attorney fees and similar litigation expenses. Litigation costs include such expenses regardless of whether or not the claimant is compensated by settlement or judgment or before suit is filed in a court of law.

(d) "Payments" refer to economic losses paid or payable by collateral sources for wage loss, medical costs, rehabilitation costs, services, and other out-of-pocket costs incurred by or on behalf of a claimant for which that party is claiming recovery through a tort suit.

(e) "Wrongdoer" means a person or party legally responsible for damages sustained by a claimant.

Section 3. A new section should be enacted to read:

Collateral Source Rule. (1) Payments to the

EXHIBIT A
DATE 2-11-87
HB 567

claimant from a collateral source cannot inure to the benefit of a wrongdoer to lessen the damages recoverable from him. This collateral source rule shall be applied in all cases where litigation expenses exceed such payments, and thus, net recovery by the claimant is less than his overall lawful damages.

(2) The collateral source rule is inapplicable only to the extent that payments exceed litigation expenses, and thus, to apply it would create a net recovery for the claimant beyond his lawful damages.

(3) When a wrongdoer alleges that the collateral source rule should not be applied because payments exceed litigation costs, he may petition the district court having proper venue and jurisdiction over the controversy to convene an evidentiary hearing to determine the reasonable value of litigation costs and collateral payments. If the district court determines that collateral payments exceed litigation costs, it shall order that any excess collateral payments be deducted from the lawful damages recovered by the claimant through settlement or judgment.

(f) Any motion or petition by the wrongdoer under subparagraph (3) above, shall be made within 30 days in cases of settlement between the parties or within the time provided for requesting a new trail under Montana Rule of Civil Procedure 59(b) in the cases of a judgment.

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2-11-87
567

Section 4. A new section to read:

Collateral payments shall not be introduced as evidence. The payment to the victim from collateral sources shall not be admissible as evidence at a trial to determine lawful damages, but shall be determined and applied under the rules set forth in this Act.

-End-

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2-11-87
567

Actuarial Analysis of American Medical Association Tort Reform Proposals

September, 1985

MILLIMAN & ROBERTSON, INC.
CONSULTING ACTUARIES

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B
211-87
567

September 11, 1985

Mr. Kirk Johnson
General Counsel
American Medical Association
535 North Dearborn
Chicago, Illinois

Dear Mr. Johnson:

We have completed our review of the potential medical professional liability cost savings related to the American Medical Association (AMA) proposed National Professional Liability Reform Act of 1985 (the Bill). This report describes our approach, our conclusions and a number of important limitations related to this type of analysis.

APPROACH

The objectives of this project were as follows:

1. To identify the potential one-time savings in medical professional liability cost attributable to the four tort reforms in the Bill. (We did not attempt to assign a value to the peer review, discipline and risk management aspects of the Bill.)

2. To identify the potential reductions in medical professional liability claim severity trend rates attributable to the Bill.

Our approach to achieving this objective included the following steps:

1. Estimate the medical professional liability premium (including self-insured costs) in the United States in 1984.

2. Estimate a range of potential savings for each of the four tort reforms in the Bill separately and combined. The bill language we evaluated is included in Appendix A.

B.
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3. Estimate the potential impact on claim severity trend rates of the reforms in the Bill.

SUMMARY OF CONCLUSIONS

The next three sections describe the results from each of the three areas.

Estimated Premium

Table 1 below summarizes the result of our review of medical professional liability costs in the United States in 1984. Appendix B describes the sources of these estimates.

Table 1

Estimated Medical Professional Liability
Premium Costs in the United States

	Item	Amount in Millions
1.	U.S. Direct Written Premium 1984	$2,258
2.	Joint Underwriting Associations (JUA) not included in 1	120
3.	Patient compensation funds (PCF), Catastrophe funds (Cat Fund) and other "pay-as-you-go" financial mechanisms	166
4.	Hospital self-insurance programs and hospital programs insured outside the United States	200
5.	Total	$2,744

The $2.7 billion total somewhat underestimates the 1984 cost since we could not identify a source which would permit us to estimate the cost of all governmental self-insurance programs nor the amount of premiums paid directly to non-United States insurers.

Our experience with medical professional liability insurers, JUA's and PCF's indicates that costs have been increasing at more than 15% per year since 1984. By 1986, medical professional liability costs are therefore likely to exceed $3.6 billion.

Potential Initial Savings

Table 2 below summarizes our estimates of the potential savings for each of the four tort reform components for a typical state.

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Table 2

Potential Initial Savings from Reform Bill

Item	Potential Savings ("Typical" State)
Periodic Payments	6%
Collateral Source Offset	8%
Limitation on Non-Economic Damages	12%
Contingency Fee Limitation	9%
Total	28%

Applied to the 1984 medical professional liability costs of $2.7 billion, the potential initial savings is approximately $800 million. Applied to the estimated 1986 medical professional liability costs of $3.6 billion, the potential initial savings is approximately $1.0 billion.

Appendix C describes the models used to develop these estimates. In addition to the cautions in the LIMITATION section below, the following should be considered:

1. To realize the potential savings it is necessary that law impact claim settlements to the same extent as court awarded claims, even though the statutory language only applies specifically to court awards. In the extreme case, if the law had no effect on settlements the value of the savings when applied only to court awards would be approximately 5%.

2. The savings will vary from state to state based on considerations which are discussed in Appendix C. Application of models to a range of state situations implies that the range of savings within which the experience of most states is likely to fall would be 23% to 33%.

3. The potential initial savings might not be fully reflected in cost reductions immediately after passage of a state law. Insurers and JUA's might be reluctant to decrease rates by the full amount of potential savings until the effectiveness of the law could be tested. PCF's generally charge premiums based on expected claim payments. For several years after passage of state law claim payments will reflect the prior law, and PCF charges will not be immediately affected. Self-insurance costs may be subject to considerations like those of insurers if the self-insurance program is fully funded or like those of PCF if the self-insurance program is not fully funded.

Exhibit B
Date 2-11-87
HB 567

If the laws were applicable to claims reported on or after the effective date then it could take three to five years to realize the full initial cost savings. If laws were applicable to claim occurrences on or after the effective date then it would take two to three years longer (five to eight years) to realize the full initial cost savings.

Impact on Trends

The element of the Bill which we anticipate will have a significant effect on claim severity trends is the limitation on non-economic damages. Appendix C describes the manner in which the impact of the law on cost trends has been estimated.

We believe the reduction in trend over the 1986-1989 period for a typical state will approximate 4% per year, with most states realizing a trend savings ranging from 3% to 6%. The trend reduction in the typical state is equivalent to $80 million per year at 1984 cost levels and $100 million at 1986 cost levels. The annual savings will continue to increase since rising cost levels will increase the $2.7 billion base ($2.0 billion after the law change) and inflation will increase the potential for non-economic loss in excess of $250,000 per claimant.

LIMITATIONS ON RESULTS

The following limitations should be considered in utilizing these results:

1. The projected potential savings rely on models which depend critically on the judgments which are applied. We believe the judgments are reasonable. Other reasonable judgments could result in significantly different results.

2. The actual savings which might result from passage of these tort reforms will depend on factors such as plaintiff behavior, attorney behavior and court interpretations which cannot be predicted in advance. Actual results may therefore differ significantly on these projections.

3. There are a number of studies underway (the GAO study for example) which are gathering statistical and non-statistical information. If such information were currently available it could significantly affect our judgments and conclusions. As part of this project we are not responsible for updating this report to reflect information which becomes available after the report is issued.

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4. The Bill is currently in outline form. Actual bill language could produce results which differ from the intended results. We have relied on interpretations from AMA Counsel regarding the intentions of the bill language.

   We assume that the agency responsible for administering the Bill would prepare minimum criteria which any state law would need to meet in order to become eligible for the benefits under the Bill. Appendix A comments on some elements which must be included in the actual operation of a state law in order to realize the potential savings.

We appreciate this opportunity to assist the American Medical Association on this important and challenging project.

Sincerely,

Allan Kaufman

Allan Kaufman, F.C.A.S.

AK/dmk

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2-11-87
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(1) Periodic Payments - Such state liability reform shall include provisions:

(A) that periodic payments shall be made for all future damages when such damages exceed $100,000;

(B) for mandatory periodic payments of such future damages over the lifetime of the beneficiary or until the damages are fully paid, whichever comes first; and

(C) that if a plaintiff dies prior to full payment of damages, the party obligated to make such payment shall retain any sums not yet paid out in accordance with the payment schedule, provided, however, that the court shall have the discretion to order continued payments necessary for the support of the plaintiff's spouse or children.

(2) Collateral Source Rule - Such state liability reform shall provide:

(A) that in an action for damages for medical injury, the damages awarded shall be reduced by amounts paid or to be paid from all collateral sources including:

(i) government disability or sickness programs;

(ii) government or private health insurance;

(iii) employer wage continuation program; and

(iv) other sources intended to compensate the plaintiff for such medical injury.

(B) that the amount that the judgment is reduced shall equal the difference between the total amounts received from collateral sources and the amount directly paid by the plaintiff to secure such amounts.

(3) Noneconomic Damages - Such state liability reform shall provide that in a judgment for medical injury not more than $250,000 may be awarded as damages for noneconomic losses.

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2-11-87
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(4) Contingency Fees - Such state liability reform shall provide that the attorney representing a medical injury claimant may not receive as a fee more than 33 1/3% of the first $150,000 of damages, 25% of the next $150,000 of damages, and 10% of the balance of any damages awarded to such claimant. The Court awarding a judgment shall be authorized to increase the permissible fee upon a petition containing evidence which in the opinion of the Court justifies additional compensation.

AMERICAN MEDICAL ASSOCIATION

Analysis of Tort Reform Proposals

Appendix A -- Comments on Interpretation of Reform Bill for Valuation Purposes

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2-11-87
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To realize the potential savings the Bill must be interpreted to accomplish the following:

(1) Periodic Payments:

a. Claimant's attorney fee should be paid periodically in the same fashion as the award or settlement amount.

b. The period of payment of future damages is estimated when the award (or settlement) is made. Amounts paid for medical costs and non-economic damages terminate at the earliest of the following two dates: (1) when the claimant dies; or (2) when the originally estimated period of payment for future damages expires.

(2) Collateral Source

a. Government programs to which an offset applies include the following: medicare, medicaid and public assistance (with respect to services rendered prior to the award or settlement date) social security retirement and disability income, veterans benefits, workers' compensation benefits and benefits to military personnel and their dependents.

b. Where public or private sources of medical benefits or income replacement coverage now permit the public or private source to place a lien on a professional liability award or permit subrogation against the professional liability tort feasor, the lien and subrogation rights must be superceded by the revised collateral source rule.

c. A mechanism must be established to permit the professional liability insurer to offset the claimants future collateral source benefits under programs such as employer sponsored health insurance against amounts of damages awarded for future medical expenses without penalizing the claimant if those benefits are not available at all times in the future. One method to accomplish this objective is to permit the professional liability insurer to issue a health insurance policy which would provide coverage for gaps in benefits awarded by a court or agreed to in a settlement if collateral sources of those benefits are not available in the future.

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(3) Non-economic Damages

The $250,000 limit is to apply to each injured patient, no matter how many health care providers are held to be negligent.

(4) Contingency Fees

a. The contingency fee schedule applies to the amount awarded to the claimant no matter how many health care providers are held to be negligent.

b. The contingency fee applies to the award or settlement amount after reduction for collateral source offsets.

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Analysis of Tort Reform Proposals

Appendix B - Sources for Table 1

1. A.M. Best Company. Covers insurers reporting to A.M. Best. These amounts are gross of reductions for reinsurance which the insurers might purchase.

2. From JUA financial statements as follows

State	Written Premium (Millions)
Florida	4.2
Massachusetts	65.6
New Hampshire	8.0
New York	6.8
Pennsylvania	4.7
Rhode Island	11.5
South Carolina	5.2
Texas	4.0
Wisconsin	10.4
Total	120.4

3. From PCF and CAT Fund financial reports

State	Assessments (Millions)
Florida	55.0
Indiana	9.5
Kansas	15.0
Louisiana	1.0
Nebraska	0.1
New Mexico	0.9
Pennsylvania	66.2
South Carolina	1.0
Wisconsin	17.3
Total	166.0

4. Hospital self-insurance programs:

   a. Hospital professional liability costs constitute approximately 25% of total medical professional liability costs (NAIC Study).

   b. We estimate that 20% to 40% (use 30%) of hospital professional liability costs are self-insured or insured directly through non-United States insurers and thus those costs are not included in items 1 - 3 above.

   c. The total of items 1 - 3 therefore constitutes all but 7.5% of total costs (7.5% is 30% of 25%). The self-insured segment is calculated to increase the total of items 1 - 3 from 92.5% (100% - 7.5%) to 100%.

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Analysis of Tort Reform Proposals

Appendix C - Description of Models

A. Limitations on Non-Economic Damages to $250,000 per Award

1. The distribution of claim size amounts is assumed to follow a log-normal distribution.

   a. The coefficient of variation of the distribution is assumed to equal 2.5 in all states.

   b. A variety of average claim size amounts assuming no policy limit were tested.

   c. For multiple defendant claims the award amounts are assumed to be distributed as the sum of highly correlated log normal distributions, each with the mean and coefficient of variations described in (a) above. (The distribution of the number of defendants is based on the 1974 - 1978 NAIC Study).

2. The non-economic damage component of the award amount is assumed to closely relate to the total award as follows:

   a. The non-economic damage amount of the unlimited awards is closely correlated to the total award, e.g., a fixed percentage.

   b. Award amounts for non-economic damages are assumed to equal 54% of the limited award amount at 1974-1978 closed claim cost levels. This percentage varies over time depending on the relationship between award size and typical policy limit.

   c. Non-economic damage award amounts are assumed to be log normally distributed with a coefficient of variations of 2.5 and a mean equal to a percentage of the total award which depends on the factors described in 2.b.

3. Legal defense costs are assumed to be equal to 25% of indemnity amounts before the limitation. Legal defense costs are assumed to be unchanged by the limitations (the defense costs become a higher percentage of the reduced indemnity costs).

4. The effect of the policy limit on reducing awards and settlements is assumed to reduce non-economic damage amounts to zero before recoveries for economic loss are affected.

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5. Since there is significant uncertainty in the actual distribution of non-economic damages by size of claim, and there is some evidence that non-economic damage compensation is a larger portion of the total cost on small claims than large claims, the savings indicated by the model described above are reduced by safety factors of 40% to produce the value shown in Table 2.

6. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

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B. Limitation on Contingency Fees

1. The claim size distribution model is the same as that described in A.1 above.

2. Claims are assumed to settle such that the plaintiff receives the same unlimited award amount with the revised contingency fee schedule as the plaintiff would have received under the old contingency fee schedule. Specifically this means the following:

   a. For unlimited claim amounts below the policy limit, the amount paid by the insurer or self-insurer is reduced by an amount equal to the reduction in the contingency fee.

   b. For unlimited claim amounts exceeding the policy limit by large amounts the plaintiff receives a greater net award (net of contingency fee) but the insurer pays the same amount.

   c. For unlimited claim amounts between the levels described in 3.a and 3.b above, the insurer pays somewhat less and the plaintiff receives a somewhat greater award net of contingency fee.

3. Legal defense costs are assumed to follow the pattern described in A.3 above.

4. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

C. Periodic Payments

1. Jury instructions commonly require the jury to consider future interest income (the time value of money), and inflation and mortality in establishing awards. If juries on the average reached conclusions which correctly considered these factors then passage of a periodic payment law might have no impact indemnity payments.

   The Bill provides that periodic payments for medical and non-economic damages will be made for the shorter of the following two time periods: (1) life expectancy as determined by the jury; (2) actual time until the claimant dies. This element of the bill produces a savings (referred to below as mortality savings) compared to the present system even if juries properly considered interest, inflation, and mortality.

2. If juries do not properly consider interest, inflation and mortality then it is hypothesized that the jury errs in favor of a larger award to the plaintiff.

   In at least one jurisdiction (Pennsylvania) juries are instructed to assume interest and inflation are equal and offsetting factors. This instruction biases awards upward because in the long run interest rates exceeds inflation rates.

3. Low, medium and high estimates of savings result from assuming the following:

   a. Low savings result from assuming that juries are instructed to consider interest, inflation and mortality and that on the average the jury awards correctly reflect these variables.

   b. High savings result from assuming that juries treat interest and inflation as offsetting factors.

   c. Medium savings result from assuming jury results between (a) and (b).

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4. The savings resulting from the assumption in 4a-c are calculated considering the following:

   a. A distribution of claimants by age and degree of injury (source: NAIC 1974 - 1978 study).

   b. The claim size model described in A.1a - A.1c.

   c. Average limited and unlimited claim size amounts as described in A.1.

   d. Assumptions regarding the portion of future and past damages by claimant age and degree of injury (Actual data on this subject is not available).

5. Legal defense costs are assumed to follow the pattern described in A.3.

6. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

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D. Collateral Source Offset

1. The coverage provided by health, and long-term disability insurance to the U.S. population through employer sponsored, privately purchased and public insurance is estimated from public information sources. (Primarily the Statistical Abstract of the United States - 1985).

2. The portion of awards related to medical care and wage loss is estimated from the NAIC 1974-1978 Closed Claim study.

3. In some awards, the award amount does not fully cover the medical costs and wage loss. In these cases the collateral source offset merely recognizes the situation that already exists, and no savings is projected.

4. Legal defense costs are assumed to follow the pattern described in A.3.

5. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

E. Comments on Terminology

UNLIMITED CLAIM SIZE AMOUNT/UNLIMITED AVERAGE CLAIM SIZE

The use of claim size distributions to approximate the actual claim amounts results in predictions of claim amounts greater than those observed in practice. Reasons for the difference between theoretical distributions and actual observations include the following: (1) the amount of insurance coverage available may limit the amounts paid; (2) primary and excess insurance coverage data often cannot be combined to produce total limit data; (3) courts, particularly in the appeal process, may limit the maximum award amounts.

The theoretical claim sizes which should be observed if none of these forces operated are referred to as unlimited claim size amounts. The average size of the unlimited claim size amounts is referred to as the unlimited average claim size. The unlimited average claim size is generally larger than claim sizes observed actual experience.

LIMITED CLAIM SIZE AMOUNTS/LIMITED AVERAGE CLAIM SIZE

The observed claim size amounts and the average of limited claim size amounts are modeled using the unlimited distribution and then capping all claims at an amount referred to as the policy limit. This limitation may be the actual policy limit, if the policy limit is the major limiting force on claim amounts. The policy limit may also be interpreted as the maximum award amount sustainable in an appeal court.

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F. Combined Effect of all Reforms

1. If the effects of the various reforms were independent, the combined savings could be calculated by multiplying the complements of the individual savings.

2. For this analysis we assume that savings through the elements of the law interact and reduce the opportunity for savings in other areas. For example, reduced economic damage recoveries through application of the collateral source offset and the limit on non-economic damages reduces the percentage savings resulting from the revised contingency fee schedule (since the amount of savings depend on the size of the award). The adjustment for this interaction is a 10% reduction in the savings calculated on a multiplicative basis.

3. It is possible that the reforms will operate synergistically on the system and produce greater savings than we have projected by reducing legal defense costs, reducing the number of claims filed, etc. On the other hand, it is possible that the savings will be less than we have projected as court decisions operate in ways which we cannot forecast.

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G. Impact on Trend Rates

1. The limitation on non-economic damages is the element of the law which would have the largest effect on future trend rates. The revised contingency fee schedule has a small effect on trend rates.

2. We used the models described in this Appendix, Section A (for the limitation on non-economic damages) and in Section B (for the limitation on contingency fees), to calculate differences between trend before the law and trend after the law over the 1985 - 1988 period for a variety of initial unlimited claim sizes and policy limits and a variety of trends in unlimited claim sizes and policy limits.

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TESTIMONY IN SUPPORT OF HB567 February 11, 1987

Mr. Chairman and Members of the Committee:

My name is Kay Foster. I appear on behalf of the Billings Area Chamber of Commerce to urge passage of HB567. Although the collateral source rule in Montana has not been adopted by statute it is presently recognized and adopted by the Montana State Supreme Court. It is the concern of the Chamber that this rule does drive up the cost of insurance for all Montanans and can lead to dual recovery for the same injury.

It appears that the bill presented here does guarantee that an injured party will be fully compensated when fault is determined but will not be doubly compensated by several payors. We urge your support.

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 567 DATE 2/11/87

SPONSOR Ramirez

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Tom KEEGAN	HELENA		✓
Erik Thuesen	Great Falls		✓
Gene J. Nelly	Billings — Mon Med. Assc	✓	
Jim Robischon	Helena - Mt Lish Coalition	✓	
Chip Erdmann	Mt League of Savings Institutions	✓	
Roger Muggenn	Independent Ins. Agents Assoc of Mt	✓	

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Judiciary COMMITTEE

BILL NO. 567 DATE 2-11-87

SPONSOR Ramirez

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CHADWICK H. SMITH	HELENA	✓	
Rep. Jim Whalen	Billings		✓
Ralph Taeger	Helena	✓	
DAN HOVEN	"	✓	
Kay Foster	Billings	✓	

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Judiciary COMMITTEE

BILL NO. HB 495 DATE 2/11/87

SPONSOR Corne

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Becky Atkins	2655 Valley Dr. Helena		X
Burkhartsmeyer, Chadene	2544 Heritage Dr		X
Dias, Marcia	10 Washington Pl.		X
~~Margaret E. English~~	~~100 Chaucer Helena~~		
Kelly M. Hogan	222 EAST MAIN #303 BZN. MT. 59715	X	
Cynthia Palmer	1612 W Olive #12 Bzn MT 59715	X	
Linda McNeil	403 W. Meadowlark, Bzn	X	

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BILL NO. 672 DATE 2-11-87

SPONSOR Whalen

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Rep Tim Whalen	Billings	✓	
Tim Robischon	Helena - MtLink Coalition		✓
Jacqueline N. Terrell	Helena - Am. Ins. Assoc.		✓
Kathy M. Irigoin	Helena - State Auditor's Office		✓
Roger A. McGlenn	Independent Ins. Agents Assoc. of Mt		✓
Dick Wenger-Swen	Helena Mt Assoc. of Defense Counsel		✓

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SPONSOR Manuel

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Lois M Russell	211 N Idaho		✓
Marie Schreiber	1508 1st avenue Hill Dr. G.F.		X
Jo Anne Peterson-Thun	519½ E. Lamm Boseman		X
Jacqueline Campbell	1512 Siler Bar Home		X
Mary Keller	625 Dearborn - Helena, mt.	X	~~X~~
Karen L. Anderson	420 Dakota Butte - MLIC		X
Susan L. Sachsenmaier	1039 Milwaukee, G.F.		X
Wilbert Johnson	Great Falls		X
Sandy Chaney	LWV		X
Chet Kmiec	MLIC		X
BL Wood	Helena		X
Ken Lucas	MLIC		X
Dean Sanders	G.F. Falls MT. CCC		X
Jo Lindberg	" "		X
Denise M Byrd	C.C.C. Great Falls		X
Dave Sands	Montana Lobby, Bud		X
Hugh Standley	MLLC L-I-G-H-T		X
Connie Barnes	MLIC - L.I.G.H.T.		X
Marie Christopher (Mt Low Income Coalition)			X

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VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 400 DATE 2-11-87

SPONSOR Manuel

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Marcia Youngman	Bozeman		X
Jane Weston	Helena	X	
Anne MacIntyre	Human Rights Commission		X
Anne Light	Concerned citizen/Belgrade	X	
John Driscoll	Mt Catholic Conf		X
Kathleen Body	Women in Transition - Bozeman		X

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VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 400 DATE Feb 11, 1987

SPONSOR

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
BRIAN McCullough	HELENA	✓	
ELmer FLeer	Billings	✓	
[redacted]	[redacted]	[redacted]	
Nancy Deeley	Msla		✓
Martha Onishuk	Msla		✓
Larry Witt	Bozeman	✓	
BOB HELDING Mt. REALTORS	MISSOULA	✓	
Anna Brodsky	Msla		✓
Linda McNicol	Bzmn	✓	✓

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Judiciary COMMITTEE

BILL NO. HB 399 DATE 3-11-87

SPONSOR Manuel

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Bruce W. Moerer	Helena - MSBA	X	
John W Laeser	OSPI	X	
Elaine Hartman	MEA - Helena		X
Anne Brodsky	Women's Law Caucus MSLA		X
Randel Waterman	MHSA	✓	
Sandy Mahoney	WLF		X
Susan Sachsenmaier	WLF		X
Katharine Cady	Bozeman		X
Claudette Morton	Board of Public Education	✓	
B/W Coal	AAUW Helena	—	
Dixie Sands	Women's Lobbyist Fund		X
Maureen Jones	Women's Opportunity & Resource Development		X
Tim Mihow	MFT		X
Marcia Youngman	Bozeman		X
Barbara Hollmann	Missoula		X
Karen L. Anderson	420 So Cobbs Butte		X
Anne MacIntyre	Human Rights Commission		✓
Margaret A English	Helena		X
Martha Ochsenbein	Helena		X
Nancy Wedin	Helena		X

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Judiciary COMMITTEE

BILL NO. HB 393 DATE 2/11/87

SPONSOR Lory

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Anne Brodsky	Women's Law Caucus Msla	X	
Frederick F. Sherwood	Helena	X	
[illegible]	Helena	X	
[illegible]	Msla	X	
Anne MacIntyre	Human Rights Commission	X	

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