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HB 288

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Montana House Committee on Education

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Testimony of Michael E. Bindas
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I thank Representative Hansen and the members of the Committee for the opportunity to speak about House Bill 288. By establishing an education savings account program for children with special needs, this bill would provide new educational opportunities for some of Montana's most vulnerable children.

My name is Michael Bindas and I am a senior attorney with the Institute for Justice. The Institute for Justice is a non-profit, public interest law firm dedicated to defending the fundamental rights of individuals and protecting the basic notions of a free society. Since its founding nearly 22 years ago, the Institute has defended school choice programs throughout the country on behalf of families whose children attend schools on scholarships made available through such programs. The Institute has twice successfully defended school choice programs in the United States Supreme Court: in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which upheld a publicly-funded voucher program in Ohio; and, more recently, in *Arizona Christian School Tuition Organization v. Winn*, __ U.S. __, 131 S. Ct. 1436 (2011), which upheld an Arizona program that provided a tax credit for contributions to non-profit organizations that granted scholarships to attend private elementary and secondary schools. The Institute has also successfully defended school choice programs in numerous state supreme courts, intermediate courts of appeal, and trial courts. One of those successes involved Arizona's education savings account program for children with special needs, which was upheld in January 2012. The decisions in these cases, coupled with Montana case law, demonstrate that the special education savings account program that HB 288 would create is constitutional.

I will begin by briefly discussing the concept of the special education savings account. As I am sure you know, a one-size-fits-all education is not right for any child, but this is particularly true for children with special needs. An education savings account therefore allows parents of special needs children to choose the education that can best meet their children's unique needs. A student participating receives a percentage of the per-pupil average of total school expenditures for his or her resident school district. Those funds are deposited in an account and parents, in turn, are permitted to make payments to educational providers from a "cafeteria-style" menu of educational options. Among other things, parents can use the funds to pay for private tutors, online instruction at a private virtual school, tuition at a brick-and-mortar private school, public or private college classes and textbooks, educational therapies from a licensed or accredited provider, or any combination of these and other options. A special education savings account thus empowers parents with as many educational options as possible so that they can design an educational program specifically tailored to meet their child's needs.

I have read the legal review note that was prepared on this bill and would like to address two of what the note called "potential issue[s]" with the bill. Specifically, I am speaking of the bill's compliance with Article V, section 11(5), and Article X, section 6, of the Montana Constitution. Although the legal review note was perhaps correct to flag these as "*potential*

issue[s]," neither is an obstacle to the special education savings account program provided for in HB 288.

The Program Does Not Violate Article V, Section 11(5)

I will begin with Article V, section 11(5), which provides: "No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state."[1] In many states, similar constitutional provisions have been interpreted as not prohibiting public funds from being paid to private individuals and institutions, so long as there is a "public purpose" underlying the appropriation. *See, e.g., Turken v. Gordon*, 224 P.3d 158, 162 (Ariz. 2010).

Although there is conflicting case law on the issue in Montana, this state appears to recognize a public purpose exception. In *Montana State Welfare Board v. Lutheran Social Services*, 480 P.2d 181 (Mont. 1971), for example, the Montana Supreme Court held that public assistance payments for indigent expectant women could be used to obtain services at private, including religious, social service providers because "[t]he primary effect of such payments . . . is the accomplishment of a public purpose." *Id.* at 186. On the other hand, eight years earlier, the court had struck down an appropriation for payment to the VFW and Disabled Americans Veterans for secretarial services at Fort Harrison because, even though the payment was for a public purpose, the VFW and Disabled American Veterans were not under the "absolute control of the state." *Veterans Welfare Commission v. VFW*, 379 P.2d 107 (Mont. 1963).

In any event, even if the public purpose exception is not recognized in Montana, the special education savings account program would still be constitutional because the provisions relating to the expenditure of special education savings account funds are under state control. The Montana Supreme Court has held that "[a]s long as the provisions relating to the expenditures of the funds . . . are under the control of the state, the constitutional mandate is satisfied." *Grossman v. State*, 682 P.2d 1319, 1334 (Mont. 1984). Thus, the court has on multiple occasions upheld appropriations that provide indirect or direct financial assistance to private individuals and entities, so long as sufficient state control is maintained. In *Huber v. Groff*, 558 P.2d 1126 (Mont. 1976), for example, the court upheld the sale of revenue bonds to raise money for residential loans to low-income individuals. Even though the program *directly* benefited banks and other mortgage lenders, as well as home builders and the individuals who received the low-interest loans, the program was upheld because the legislature had clearly set out the duties and powers of the state agency responsible for administering the program. Similarly, in *Douglas v. Judge*, 568 P.2d 530 (Mont. 1977), the court upheld an appropriation to provide loans to farmers and ranchers. Emphasizing the level of state control over the loan program, the court held: "Total control over granting of these loans is vested in the Department of Natural Resources and Conservation. We hold that sufficient control over the appropriated funds is vested in the state and the mandate of Article V, § 11(5) is met." *Id.* at 533; *see also*

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[1] Prior to the 1972 constitutional convention, this provision prohibited appropriations not under the "absolute" control of the state. The 1972 constitution, however, omits the "absolute" qualifier, and the Montana Supreme Court has emphasized the significance of that change. *See Huber v. Groff*, 558 P.2d 1126, 1131-32 (Mont. 1976).

Grossman v. State, 682 P.2d 1319 (Mont. 1984) (upholding appropriations for development of state water resources that could later be leased by private corporations).

The same structural protections and control over funds that existed in these cases are present in the special education savings account program created by HB 288. Although the program gives parents a wide range of educational options, HB 288 limits the use of funds to the specific educational expenses enumerated in the program. Moreover, HB 288 designates state agencies to administer, oversee, and audit the program and the funds used pursuant to it. Simply put, the funds remain sufficiently "under control of the state" to pass constitutional muster.

Finally, it must be recalled that the use of public funds to pay tuition at private institutions is common in Montana at both the K-12 and post-secondary levels. For example, Montana's education code authorizes the superintendent of public instruction to contract with private hospitals and residential treatment facilities and to pay those private institutions for educational services provided to children with special needs. *See* Mont. Code Ann. § 20-7-435. Moreover, there are at least two state-funded college tuition grant programs: the Montana Higher Education Grant and the Montana Tuition Assistance Program. To claim that the special education savings account program created by HB 288 violates Article V, section 11(5), is to call into question the constitutionality of these longstanding programs.

The Program Does Not Violate Article X, Section 6

Nor would the special education savings account program violate Article X, section 6, which provides, in relevant part:

> The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriations or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

By its plain terms, this provision does not preclude the creation of the special education savings account program.

Article X, section 6, is concerned with appropriations made (1) for a "sectarian purpose" or (2) "to aid" religious institutions, including schools. The special education savings account program does neither. Rather, it advances valid, non-religious and non-sectarian purposes: ensuring that Montana's children have access to an educational program tailored to their unique, individual needs; and enabling parents to choose the best educational options for their children. Moreover, the program is not intended "to aid" religious schools. It aids children, and private religious schools are only one of the many educational options—public and private, religious and non-religious—on which parents may choose to use their savings account funds.

The non-religious, or secular, purposes undergirding the special education savings account program are readily apparent: to increase parental choice and control over education and to ensure that each child's unique educational needs are met. No court has ever struck down a school choice program on the basis that it was passed for religious purposes. The U.S. Supreme Court's discussion of this issue in *Mueller v. Allen*, 463 U.S. 388, 395 (1983), is particularly instructive:

> A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated.

Indeed, were private and parochial schools *not* capable of performing a secular educational function, Montana would not allow them to satisfy its compulsory education laws. Of course, it does.

Similarly, the special education savings account program would not make any "direct or indirect" appropriations or payments "to aid" religious institutions. In *Montana State Welfare Board v. Lutheran Social Services*, 480 P.2d 181 (Mont. 1971), which I discussed above, the Montana Supreme Court held that public assistance payments for indigent expectant women could be used to obtain services at private, including religious, social service providers without running afoul of the constitutional prohibition on direct or indirect appropriations or payments to religious institutions.[2] The Court held that the private and religious providers were in "no way . . . directly or indirectly benefited by payments to or on behalf of a qualified recipient." *Id.* at 186.

Finally, it must be recalled that while Article X, section 6, prohibits direct or indirect financial support that is intended to aid religious schools, the special education savings account program that HB 288 creates would not earmark a single dollar for any type of educational service provider—much less religious schools. Parents would be permitted a free and independent choice to select the educational service providers and products that will best serve their children's needs from a large menu of educational options.

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[2] Although *Montana State Welfare Board v. Lutheran Social Services* was decided under the pre-1972 Montana Constitution, that constitution contained a substantively similar provision: "Neither the legislative assembly, nor any county, city, town, or school district, or other public corporations, shall ever make *directly or indirectly*, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property *in aid of* any church, or for any sectarian purpose, or *to aid* in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in party by any church, sect or denomination whatever." (Emphasis added.)

In fact, in January 2012, the Maricopa County Superior Court emphasized this very point in rejecting a challenge to Arizona's Empowerment Account Program—the nation's first education savings account program—under a provision of the Arizona Constitution that provides, "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." Ariz. Const. art. 9, § 10. As the court explained:

> The program gives parents a full menu of educational options on which to spend the funds. In that way, it is abundantly clear the program aids individuals—not institutions. And, with all constitutional choice programs, parents—not the government—decide which school a child attends.

In summary, legal precedent supports creating a special education savings account program. Doing so would expand educational opportunity for Montana's children with special needs—some of the state's most vulnerable children. We therefore respectfully urge this Committee to vote "Yes" on HB 288.

Thank you for your attention and for the opportunity to testify this afternoon.