



# Task Force on State Public Defender Operations

## 64th Montana Legislature

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### HOUSE MEMBERS

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### SENATE MEMBERS

DAVID HOWARD  
JIM KEANE  
CYNTHIA WOLKEN

### PUBLIC MEMBERS

HON. JAMES HAYNES  
MIKE EAKIN  
JASON TRINITY HOLDEN  
WENDY HOLTON  
JULI PIERCE

### COMMITTEE STAFF

DAVE BOHYER, RESEARCH DIRECTOR  
JULIE JOHNSON, ATTORNEY  
FONG HOM, SECRETARY

## MINUTES

May 16, 2016  
Room 137, Capitol Building  
Helena, Montana

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Please contact the Legislative Services Division at 406-444-3064 for more information.

### COMMITTEE MEMBERS PRESENT

REP. KIMBERLY DUDIK, Chair  
REP. RANDY BRODEHL, Vice Chair

SEN. DAVID HOWARD  
SEN. JIM KEANE  
SEN. CYNTHIA WOLKEN

REP. KENNETH HOLMLUND

HON. JAMES HAYNES  
MIKE EAKIN  
JASON TRINITY HOLDEN  
WENDY HOLTON  
JULI PIERCE

### STAFF PRESENT

DAVE BOHYER, Research Director  
JULIE JOHNSON, Attorney  
FONG HOM, Committee Secretary

**VISITORS' LIST** ([Attachment 1](#))

**AGENDA** ([Attachment 2](#))

**COMMITTEE ACTION**

**CALL TO ORDER and ROLL CALL** - Rep. Dudik, Chair

00:00:01 Rep. Dudik called the meeting to order at 8:34 a.m. The committee secretary called roll. ([Attachment 3](#))

**STATUS CHECK REGARDING STUDY PLAN** - Dave Bohyer, LSD Research Director

00:01:30 Mr. Bohyer ([Exhibit 1](#))

**PROVIDE OVERVIEW OF WHAT NEEDS TO BE ACCOMPLISHED IN REMAINING MEETINGS**

00:04:20 Rep. Dudik

**COMMITTEE DISCUSSION** - Member thoughts on information received to date and plans to finish work

00:04:15 The committee members discussed areas that they would like prioritize, such as eligibility and income verification, fee collection, the overall costs of maintaining the office, and the budget.

00:22:00 Sen. Wolken gave an overview of what the Commission on Sentencing is trying to accomplish.

**ISSUE REVIEW AND TASK FORCE MEMBER QUESTIONS**

**Presentation and Discussion**

**Option for professional administration and management of OPD, OAPD, Conflict Coordination, Contract Management (LC6271)**

00:24:04 Mr. Bohyer discussed options for professional administration and management of the functions of the Office of the Public Defender, Appellate Defender, and Conflict Coordinator ([Exhibit 2](#)), and LC 6271 ([Exhibit 3](#)).

**Committee Questions**

00:28:22 Judge Haynes asked about possible recommendations in LC6271.

00:29:37 Rep. Brodehl suggested that the Executive Branch be responsible for the appointment of the executive director.

00:32:17 Mr. Holden cautioned the Task Force in changing the Commission structure.

00:34:08 Rep. Brodehl discussed shifting the Public Defender Commission to advisory and transfer the hiring responsibilities to the executive director.

00:35:29 Ms. Holton discussed her concerns of creating an executive director position.

00:36:37 Judge Haynes discussed his concern of creating a fourth program for the Office of the Public Defender.

### **Public Comment on LC6271**

00:39:27 Fritz Gillespie, Chief, Public Defender Commission

### **Option to revise PD Commission duties as advisory only (LC6272)**

00:43:06 Mr. Bohyer discussed the option to revise the PDC's duties to be advisory only to an Executive Director ([Exhibit 4](#)), and LC6272 ([Exhibit 5](#))

### **Committee Questions**

00:45:58 Rep. Brodehl discussed Mr. Freebourn's position.

00:46:27 Rep. Holmlund said he would like to hear what the Public Defender Office's proposals are.

### **Option for adding prosecutor to Public Defender Commission (LC6273)**

00:50:25 Mr. Bohyer discussed the option to add a prosecutor to the Public Defender Commission ([Exhibit 6](#)), and LC6273 ([Exhibit 7](#)).

### **Committee Questions**

00:53:12 Rep. Brodehl recommended that the prosecutor position be taken out of 2(a) or 2(b) where two or three attorneys are appointed and one of those be designated as a prosecutor.

00:54:17 Ms. Holton said that the Task Force should consider whether there is an inherent conflict in having a prosecutor on the Commission.

### **Summary of Survey Responses**

00:55:30 Mr. Bohyer ([Exhibit 8](#))

### **Options for Reorganizing Public Defender Commission**

01:07:39 Mr. Bohyer ([Exhibit 9](#))

### **Applications for "hardship" determination and number of prosecutions for false swearing to income, assets, and expenses**

01:12:32 Mr. Bohyer ([Exhibit 10](#))

### **Options to improve "training"**

01:15:34 Mr. Bohyer discussed the options to improve training for OPD staff and contractors ([Exhibit 11](#)), Peter Ohman's memo on Mentoring Program ([Exhibit 12](#)), and Peter Ohman's Training Report ([Exhibit 13](#)).

### **Options to improve "retention"**

01:20:06 Mr. Bohyer ([Exhibit 14](#))

**BREAK** (reconvened at 10:28 a.m.)

### **Comparisons of public defender salary and benefits**

01:54:43 Mr. Bohyer discussed salary and benefits for Montana public defenders ([Exhibit 15](#)), and other states' salary and benefit comparisons ([Exhibit 16](#)).

**National guidelines for appointment of public defender for absentee parents in Dependent Neglect cases**

01:56:06 Mr. Bohyer

**Options to improve/reduce OPD "caseloads"**

01:57:00 Mr. Bohyer ([Exhibit 17](#))

**NEW ISSUES PRESENTATIONS AND TASK FORCE MEMBER QUESTIONS**

**The Confederated Salish and Kootenai Tribes, Tribal Defenders Holistic Defense Program - Ann Sherwood, Public Defender, Confederated Salish and Kootenai Tribes**

02:00:56 Ms. Sherwood ([Exhibit 18](#))

Committee Questions of Ms. Sherwood

02:22:17 Rep. Dudik asked about the program's statistics.

02:24:27 Mr. Eakin asked about financial screening, how much of a buy in is needed to have the holistic approach, and who would export the cultural mentoring in the communities of Circle and Roundup.

02:27:55 Sen. Keane asked about the grants.

**LEGAL ANALYSES OF VARIOUS ISSUES - Julie Johnson, Staff Attorney Presentation and Discussion**

Ms. Johnson gave a presentation on the following legal memorandums:

02:31:33 Statutory Separation of PDC, OPD, OAPD, and CCO ([Exhibit 19](#)) Soft

02:33:04 Caps ([Exhibit 20](#))

02:39:33 Minimum Legal Requirements for Appointment of Counsel in DN Cases ([Exhibit 21](#))

Committee Questions

02:42:41 Rep. Dudik commented on the zero credit points the state received for not having caseload standards for attorneys representing children in dependency cases.

02:43:09 Mr. Holden asked about punitive fathers receiving appointments.

02:43:57 Rep. Dudik asked about changing the definition of a parent.

02:44:08 Ms. Pierce referred the committee members to 41-3-425, MCA.

02:46:43 Sen. Keane asked Ms. Johnson about the possibility of incorporating some of Ms. Sherwood's ideas into a system on a trial basis.

**Thoughts from Committee members on moving forward**

02:49:18 Ms. Pierce discussed the goals and the purpose of the Task Force.

02:52:49 Rep. Holmlund talked about the situation of territorialism that is in the public defender system.

02:54:13 Mr. Holden discussed his observations while being on the Task Force.

02:59:25 Rep. Brodehl discussed adding a fourth program and that the focus should be on who the executive director would be responsible to.

03:01:48 Sen. Wolken discussed how to support the front line staff and how to support and improve the defense program.

03:03:33 Ms. Holton discussed the problems of dealing with the 6th and 14th Amendments and the Office of the Public Defender's strategic plan.

- 03:06:20 Sen. Howard discussed costs between contracting attorneys and existing employees.
- 03:07:36 Mr. Eakin discussed training and the management of caseloads.
- 03:11:17 Judge Haynes discussed the holistic defense and hoped to expand that throughout the state.
- 03:15:31 Mr. Bohyer announced his upcoming retirement and said that Sheri Scurr will become the lead research for the Task Force.

**LUNCH** (reconvened at 12:59 p.m.)

**PUBLIC DEFENDER COMMISSION - DRAFT STRATEGIC PLAN - Bonnie Olson, Public Defender Council**

04:25:14 Ms. Olson ([Exhibit 22](#))

Committee Questions

- 04:58:28 Ms. Pierce asked about the Minnesota model.
- 05:00:23 Judge Haynes asked about the next de facto chair of the Commission and the possibility of having four programs with no chair.
- 05:03:26 Rep. Brodehl asked about changing the title of chief administrator to an executive director and whether or not the Commission would delay hiring a chief administrator until the Task Force had made recommendations regarding the positions of an executive director or chief administrator.
- 05:15:16 Sen. Keane encouraged the hiring of a temporary chief administrator.
- 05:16:27 Judge Haynes discussed the concerns of not wanting an executive director to be involved in case management.
- 05:17:28 Rep. Dudik asked about developing a mechanism to assess and evaluate attorney performance based on the Montana Public Defender Practice Standards.

**Public comment on the PDC draft strategic plan**

05:21:04 Jim Taylor, ACLU Montana

Committee Questions of Mr. Taylor

- 05:37:45 Mr. Holden asked about any concerns as it relates to the creation of an executive director that is in a supervisory role over an appellate defender.
- 05:39:34 Judge Haynes relayed to the committee his communication with Chief Justice Mike McGrath regarding the Judiciary Branch taking on some duties of the chief administrator in the Office of the Public Defender.
- 05:42:08 Mr. Taylor commented on a statement made earlier regarding changes in representation of youth under the age of 2.

**OFFICE OF PUBLIC DEFENDER RESPONSES AND ISSUES**

**OPD Flowchart: Eligibility Determination and Fees**

05:44:40 Mr. Gillespie ([Exhibit 23](#))

**OPD Options for Collection of section 46-8-113, MCA, fees**

05:51:22 Mr. Gillespie ([Exhibit 24](#))

05:51:48 Rep. Dudik referred the committee to the memo from Mr. Hooks. [\(Exhibit 25\)](#)

**OPD: Historical actions for OPD funding requests; supplementals; SB 410**

05:54:35 Harry Freebourn [\(Exhibit 26\)](#)

Committee Questions of Mr. Freebourn

05:57:42 Rep. Dudik asked about a specialized division dealing with the representation of children.

06:00:02 Rep. Dudik asked for a more information on the costs of contract attorneys in dependent neglect cases.

**OPD Agency Reorganization: Complement to the Strategic Plan**

06:01:36 Mr. Gillespie [\(Exhibit 27\)](#)

Committee Questions of Mr. Gillespie

06:15:32 Rep. Brodehl asked about the budget.

06:21:25 Ms. Pierce responded to Rep. Brodehl's comment on DPHHS' Child and Family Services' budget.

06:22:37 Mr. Eakin asked about the Commission's comfort zone with having the four divisions.

06:25:24 Mr. Holden asked about the finances and operation of the Commission.

06:30:34 Rep. Holden asked if the Commission had thought about changing the name Public Defender to something like Federal Defenders or Montana Defenders.

06:31:07 Rep. Holmlund asked about the number of hours involved to do noncriminal cases.

**BREAK** (reconvened at 3:31 p.m.)

**Public Comment on any topic within the Task Force's purview and within guidelines established by the Presiding Officer.**

06:57:34 Mark Murphy, Montana County Attorneys Association, commented on the Public Defender Commission's Strategic Plan.

07:10:11 Jim Taylor, ACLU Montana, supported the holistic defense and encouraged the task force to look favorably on models like holistic defense.

07:13:59 Margaret Novak, member of the Public Defense Commission, commented on the importance of not having a commission appointed by a political entity.

07:18:21 Ann Sherwood, Tribal Defenders Office for Confederated and Commission, commented on the transferability to the holistic defender program.

**TASK FORCE WORK SESSION**

07:22:15 Ms. Pierce asked about the drafting of the final report and what that final report will include.

**Motion**

07:23:40 Judge Haynes moved to revise legislation in Title 47 regarding the duties of the Public Defender Commission, to create an executive director position with the other programs reporting to the executive director, to place the Public Defender Commission in an advisory capacity, and that the executive director be appointed by the governor.

Committee Discussion on the Motion

07:24:57 Rep Brodehl supported Judge Haynes' motion.

**Vote**

07:25:40 The motion passed on a roll call vote, 9-2. ([Attachment 4](#))

**Motion**

07:27:29 Sen. Keane moved to draft legislation to create four pilot programs using the holistic defense models.

Committee Discussion on the Motion

07:28:40 Ms. Pierce asked Sen. Keane about the logistics of the four pilot programs.

07:29:27 Mr. Bohyer asked about the logistics and the number of pilot programs and a contact person.

**Vote**

07:33:18 The motion passed unanimously on a voice vote.

**Motion**

07:33:57 Sen. Wolken moved to draft legislation to move eligibility determinations from the Office of the Public Defender to the court system.

Committee Discussion on the Motion

07:35:46 Mr. Eakin asked if there will be different standards in different judicial districts.

07:36:57 Judge Haynes asked about the Department of Public Health and Human Services already being responsible for eligibility determinations.

07:38:34 Sen. Howard commented on Sen. Wolken's motion.

07:40:13 Mr. Holden commented on eligibility determinations.

07:42:20 Rep. Dudik asked Sen. Wolken about the intent of her motion.

**Vote**

07:46:54 The motion passed 6-5, with Judge Haynes, Mr. Eakin, Ms. Pierce, Mr. Holden, and Rep. Holmlund voting no.

**Motion/Vote**

07:48:01 Judge Haynes moved that the eligibility determinations be moved from the Office of the Public Defender to the Department of Public Health and Human Services. The motion passed 7-4, with Mr. Holden, Sen. Keane, Sen. Wolken, and Ms. Pierce voting no.

07:50:05 Judge Haynes explained the intent of his motion.

**Motion**

07:50:22 Rep. Brodehl moved that Title 47 be changed so that the Department of Revenue would be responsible for the collection of fees.

Committee Discussion on the Motion

07:50:51 Sen. Keane asked if that would include collection of nonpayment.

07:51:17 Rep. Brodehl said that he would amend his motion to an effective collection

process.

- 07:52:00 Mr. Bohyer asked for clarification on the motion for drafting purposes.  
07:52:11 Rep. Brodehl said that he would recommend that the motion is applied to the Office of the Public Defender for collection of fees.  
07:52:32 Mr. Eakin asked about notification to the Department of Revenue to start its enforcement of the collection of fees.  
07:53:09 Rep. Brodehl said that his preference is to let the bill drafters look at the language to determine notification of fee collection.  
07:53:29 Ms. Holton asked if the Office of the Public Defender is expected to go out and collect the fees.  
07:55:35 Mr. Eakin discussed removing the collection of fees from the court system.

**Vote**

- 07:56:40 The motion passed on roll call vote, 9-2. **(Attachment 5)**

**Motion**

- 07:58:22 Mr. Holden moved to maintain the current commission structure with the creation of a Chief Administrator position as proposed by the Office of the Public Defender.

**Committee Discussion on the Motion**

- 07:59:14 Ms. Holton asked about an executive director or a chief administrator as proposed by the Public Defender.  
07:59:25 Mr. Holden said he would use the Public Defender's terminology of "chief administrator".  
08:00:04 Judge Haynes said he is opposed to the motion.

**Vote**

- 08:01:40 The motion passed 6-5, on a voice vote with Reps. Dudik and Brodehl, and Sens. Howard and Wolken, and Judge Haynes voting no.

**Motion**

- 08:02:29 Mr. Holden moved to maintain the current Commission structure with the creation of an executive director position which would be directly responsible to the Commission, and under that executive director position would be the chief appellate defender, the chief defender, and the conflicts coordinator.

**Vote**

- 08:05:21 The motion failed on a roll call vote, 6-5. **(Attachment 6)**

**Motion**

- 08:05:30 Ms. Pierce moved to form a workload study to be done by an outside agency of the Office of the Public Defender and give a baseline of where the work is.

**Commission Discussion on the Motion**

- 08:05:56 Sen. Keane will vote no on that motion because that is the job of the task force.  
08:06:07 Rep. Brodehl explained that this would come out as a study bill.  
08:06:39 Rep. Dudik asked Ms. Pierce what her intent of the motion is.  
08:07:25 Ms. Pierce said that she is requesting that an outside study be ordered.



08:08:28 Rep. Brodehl asked about the costs of a workload study.  
08:08:47 Mr. Gillespie answered that the costs is about \$200,000 and that the study would take about a year.

### **Amended Motion**

08:09:11 Sen. Keane amended Ms. Pierce's motion for a workload study to appropriate a maximum of \$200,000 to pay for the costs of the study.

### **Discussion on the Amended Motion**

08:09:54 Judge Haynes said that he is concerned with putting a cap until good data is collected.

### **Vote on the Amended Motion**

08:11:32 The amended motion failed on a roll call vote, 6-5. ([Attachment 7](#))

### **Vote on Ms. Pierce's Motion**

08:15:05 The motion passed on a roll call vote, 10-1. ([Attachment 8](#))

### **Motion**

08:14:10 Mr. Holden moved that the Task Force recommend legislation to be drafted to raise the contractor hourly rate from \$62/hour to the median of \$92/hour.

### **Discussion on the Motion**

08:14:32 Rep. Brodehl asked for clarification on assigning rates the need for new legislation to set those rates.  
08:15:46 Ms. Pierce asked Mr. Holden if his intent was to include anything related to a soft cap.  
08:16:31 Mr. Holden said there could be a friendly amendment to including soft cap. There could be a creation of a statutory scheme looking at a soft cap with an hourly rate and to address Rep. Brodehl's concern with a cost of living increase each year.

### **Friendly Amendment**

08:16:42 Ms. Pierce offered a friendly amendment to investigate soft caps and a cost of living increase to the \$92/hour.

### **Discussion on the Friendly Amendment**

08:18:26 Rep. Brodehl clarified why he is opposed to this motion.  
08:18:31 Judge Haynes asked about the contract rate and the contract rate being extrapolated back to the OPD.  
08:18:48 Mr. Holden said he is just looking at the contractor hourly rate.  
08:19:29 Sen. Howard asked Rep. Brodehl about the source of the money.  
08:20:20 Sen. Howard said that he would vote no.  
08:21:18 Sen. Keane said that he would vote no because this would be a statutory appropriation.  
08:22:08 Ms. Pierce asked if the OPD could increase the contract rate.

**Vote**

08:23:44 The Friendly Amendment to Mr. Holden's motion failed on a voice vote, with Rep. Holmlund, Rep. Brodehl, Sen. Keane, and Sen. Howard voting no.

**Vote on Mr. Holden's Motion**

08:24:36 The motion failed on a voice vote.

**Motion**

08:25:13 Mr. Eakin moved to give statutory authority to the Office of the Public Defender to have different contract rates and different geographical areas to meet the needs of contract attorneys in rural areas.

**Discussion on the Motion**

08:25:56 Rep. Brodehl asked Ms. Johnson if OPD already had that authority.

08:25:58 Ms. Johnson said yes.

08:26:48 *Sen. Wolken left the meeting at 5:01 p.m.*

08:26:22 Mr. Eakin said if that is already in place by statute, he would proceed with his motion.

08:27:08 Mr. Freebourn discussed his administrative rule that puts the ratemaking policy into the hands of the commission.

**Vote**

08:27:20 The motion failed on a voice vote, 9-2, with Mr. Holden and Mr. Eakin voting yes, and Sen. Wolken voting no by proxy.

08:28:52 Ms. Pierce asked about the task force helping the Commission on Sentencing with reducing misdemeanor caseloads in the Office of the Public Defender.

08:29:29 Ms. Holton asked if there are any statutory changes for dependent and neglect cases.

**Motion**

08:30:14 Rep. Dudik moved to statutorily separate all divisions of the Office of the Public Defender as was described by Ms. Johnson.

**Committee Discussion on the Motion**

08:30:53 Judge Haynes asked about whether there are any advantages if the Office of the Public Defender were to go to the executive director model.

**Vote**

08:31:41 The motion passed unanimously by voice vote.

**Motion**

08:32:27 Rep. Dudik moved that staff draft legislation to change the appointment of counsel in dependent neglect cases regarding punitive parents to meet the constitutional requirements.

#### Committee Discussion on the Motion

- 08:33:04 Judge Haynes asked if that would include children under age 2.  
08:33:13 Rep. Dudik said no.  
08:33:33 Judge Haynes ask whether or not fathers who are serving in default would be in that category and would be able to show up.  
08:33:45 Rep. Dudik said that was not part of her motion.

#### **Friendly Amendment**

- 08:33:52 Judge Haynes made a friendly amendment to include parents who have been served but did not show up.

#### **Vote on the Friendly Amendment**

- 08:34:08 The motion passed unanimously by voice vote with Sen. Wolken voting yes by proxy.

#### Committee Discussion on the Motion

- 08:34:27 Rep. Dudik said the motion on the table is to change the appointment of counsel for punitive fathers who have been served but did not appear. She asked if that would include mothers who have been served but do not appear.  
08:34:41 Judge Haynes said yes.  
08:34:55 Rep. Dudik wanted to make sure there is no gender imbalance.

#### **Amended Motion**

- 08:35:08 Judge Haynes moved to amend the motion to include all fathers and mothers that have been served and who did not appear.

#### Committee Discussion on the Amended Motion

- 08:35:31 Mr. Eakin asked if it would be wise to appoint fathers until the first show cause hearing.  
08:36:03 Rep. Brodehl asked to hear from the agency about the logistics.  
08:36:28 Rep. Dudik gave a timeline of the motions.  
08:37:15 Mr. Hooks discussed jeopardizing the potential finality of these cases if there isn't an attorney at the front end. In the interest of finality, maybe there is a point at which, after attorneys are appointed at the front end, the public defender identifies some appropriate triggering mechanism and then move to withdraw.

#### **Substitute Motion to the original motion**

- 08:39:01 Rep. Dudik moved for a substitute motion to only have punitive fathers not have an appointed counsel until they have been identified, and take out the fathers who we know have been served.

#### **Vote on the Substitute Motion**

- 08:39:23 The motion passed unanimously by voice vote with Sen. Wolken voting yes by proxy.

#### Committee Discussion on Soft Caps

- 08:40:04 Rep. Dudik discussed soft caps.  
08:40:18 Mr. Holden said that it is his understanding that what occurs is that any type of

soft cap system that sets an hourly rate and sets a dollar amount may be subject to appropriations.

08:41:01 Rep. Dudik said that a motion could be made to have the Office of the Public Defender establish a soft cap system.

08:41:27 Mr. Holden asked if the committee has the ability to ask that the Office of the Public Defender raise their contract rate.

08:41:59 Sen. Howard said that if Office of the Public Defender is already doing that, then the committee is being redundant.

### **Motion**

08:42:50 Ms. Pierce moved to require the Office of the Public Defender to set a soft cap system.

### **Vote**

08:43:16 The motion passed with Ms. Holton, Mr. Holden, Rep. Holmlund and Rep. Brodehl voting no, and Sen. Wolken voting yes by proxy.

### **OTHER ISSUES**

08:44:21 Ms. Pierce discussed training and mentorship.

08:46:20 Sen. Keane requested that staff put training and mentorship into the final report.

08:46:46 Ms. Holton requested that the recommendation for an increase in contractor rates be in the final report.

08:47:08 Mr. Holden would like the words "Public Defender" not be a part of the Office of the Public Defender. He said he would like to see it as the Montana Defender's Office.

### **Motion**

08:47:25 Mr. Holden moved that the Office of the Public Defender be renamed as the Montana Defender's Office.

### **Committee Discussion on the Motion**

08:47:38 Sen. Howard asked Ms. Johnson if Mr. Holden's motion would have to be a constitutional amendment.

08:48:04 Rep. Brodehl said that that is not the responsibility of this committee.

08:48:28 Mr. Eakin asked about the consequences of changing names.

08:49:16 ***Mr. Holden withdrew his motion.***

08:49:25 Rep. Dudik said she would ask the Office of the Public Defender to contemplate the changes that were talked about.

08:50:49 Sen. Keane congratulated Mr. Bohyer on his retirement.

### **ADJOURNMENT**

08:51:20 With no further business before the committee, Rep. Dudik adjourned the meeting at 5:25 p.m.