**MINUTES**

**MONTANA SENATE**
**58th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN DUANE GRIMES**, on January 14, 2003 at 8:00 A.M., in Room 172 Capitol.

**ROLL CALL**

**Members Present:**
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**
Hearing(s) & Date(s) Posted: SB 48, 1/9/2003; SB25, 1/9/2003; SB 44, 1/9/2003; SB133, 1/9/2003
Executive Action: SB 30; SB44; SB68; SB 133

## HEARING ON 48

**Sponsor:** **SEN. BOB KEENAN, SD 38, BIGFORK**

**Proponents:** **None**

**Opponents:** **Anita Roessmann, Montana Advocacy Program**

**Informational Witness:**

**Beta Lovitt, Friend of Respondent for Mental Health Hearings in Lewis and Clark County**

**Opening Statement by Sponsor:**

**SEN. BOB KEENAN, SD 38, BIGFORK,** introduced SB 48 which was another bill requested by the House Joint Resolution (HJR) 1 Subcommittee. It has been endorsed by the Finance Committee. He further noted that this bill addresses the K.G.F decision by the Montana Supreme Court. The bill statutorily authorizes counsel, after consultation with the client and when determined to be in the client's best interest, to authorize expedited access to treatment in order to reduce the threat of injury to self or others. The K.G.F. decision established criteria and standards for attorneys representing respondents in involuntary mental health commitment proceedings. Among other directives included in the decision, attorneys are to advise clients of their right to remain silent, advocate for the client's chosen outcome, prepare an adversarial defense, and request delays in proceedings in order to prepare and be present in all mental health evaluations. This bill provides that attorneys, in consultation with their clients, may decide that expedited access to treatment is in the best interest of the client.

He provided a packet of information for Committee members which included: Minutes from HJR 1 Committee on September 18th and 19th - **EXHIBIT(jus07b01);** a summary written by Kathy McGowan, who represents the Montana Sheriff and Peace Officers Association - **EXHIBIT(jus07b02);** a copy of draft legislation on this bill - **EXHIBIT(jus07b03);** HJR 1 Public Mental Health Services Study Committee letter to Karla Gray, Chief Justice, Montana Supreme Court dated July 8, 2002 - **EXHIBIT(jus07b04);** a letter from Jerry Fehrenbach, the husband of K.G.F. - **EXHIBIT(jus07b05);** a letter from the Montana Supreme Court in response to the Study Committee's letter of July 8, 2002 - **EXHIBIT(jus07b06);** a letter written to Supreme Court Justice James C. Nelson - **EXHIBIT(jus07b07);** the Montana Supreme Court decision in K.G.F. -

**EXHIBIT(jus07b08)**; a statutory overview of the chronology of commitment procedure - **EXHIBIT(jus07b09)**; and copy of a report from Legislative Services Division entitled "Mental Competency of the Accused: An Analysis of Statutes Relating to Mental Disease or Defect and Criminal Procedure or 'Forensic' Patients" **EXHIBIT(jus07b10)**.

**Proponents' Testimony**: None

**Opponents' Testimony**:

**Anita Roessmann, Montana Advocacy Program**, remarked that she did not understand the bill. She authored the brief in the K.G.F. decision. She questioned the new language on page 1, lines 23 and 24. She believed the language provided that counsel of the person named in the commitment petition would be making a health care decision in conjunction with the client. The patient, and only the patient, can make the decision whether or not to seek health care. Counsel does not have the authority to tell the physician what the patient would like to do. The patient makes their own health care decisions even after they are committed unless the court's order holds that the person can be involuntarily medicated. The K.G.F. decision set out five new rules for public defenders to follow when representing persons in commitment decisions. Public defenders do not recognize that while their client is in detention, they can and should tell the client that it would be in his or her best interests to receive treatment while waiting for their hearing. The bill should state that counsel may tell the client that he or she has a right to treatment and receiving treatment will not interfere with their right of due process.

In a criminal case, even though the person is seriously mentally ill, there are times that defense counsel will advise the client that it is not in his or her best interest to take medication. Defense counsel may also become involved in a legal battle in court to prevent doctors from forcibly medicating a client. Medication may make the client sleepy and unable to cooperate with an attorney. There are times when the attorney does not want their client medicated to make them well so that the State can pursue the death penalty against them or they may want the jury to see the disorganized and/or delusional person who committed the crime.

**Informational Testimony**:

**Beta Lovitt, Friend of Respondent for Mental Health Hearings in Lewis and Clark County**, noted that she works with public defenders in representing individuals who are brought in for

civil commitment. Her job is to protect the individual's rights. She doesn't understand the new language and is not sure what it is intended to accomplish. In many cases, the very best interests of the individual is to be admitted to the Montana State Hospital as quickly as possible because he or she needs intensive care.

**Questions from Committee Members and Responses**:

**CHAIRMAN DUANE GRIMES** asked **Greg Petesch, Legislative Services Division**, to explain the intention of the bill. **Mr. Petesch** claimed that the bill intended to provide a clear statement, in law, which counsel may rely on in making the decisions that both **Ms. Lovitt** and **Ms. Roessman** have stated. The issue appealed to the Montana Supreme Court in K.G.F. was whether or not the constitutional rights of the accused in criminal defense cases apply to civil commitments. The Court held that they do not. They further adopted rules governing what was to be done by criminal defense attorneys when representing a person subject to a civil commitment. This is the first time those requirements were clearly articulated. It is difficult to argue with those standards. Zealous defense of the client's liberty interest, including the right to remain silent, can be construed as not talking to a professional person. This can have ramifications of all of the due process requirements in place to protect the individual. This bill is to give a clear statement to counsel that the Legislature does not believe that the defense attorney would be violating the zealous representation requirement if he or she determined, in consultation with their client, that it was in the client's best interest to have access to treatment. Treatment may include medications the client was taking that they are no longer taking. In addition to the rules adopted by the Court, this language would also be available for counsel to rely on when making this determination.

**SEN. JERRY O'NEIL** stated that in divorce proceedings one spouse is able to take a court action without the other spouse's knowledge of the action. This is a civil action. He questioned why the issue addressed in this bill would be more unconstitutional than the situation in a divorce proceeding. **Ms. Roessmann** maintained that she did not know the level of protection afforded persons in a divorce or child custody proceeding. In civil commitment proceedings, the Montana Supreme Court and the U.S. Supreme Court have both held that there is a liberty interest involved because the person can be locked up against their will. The Montana Supreme Court has further noted that due process must be served and the first requirement of due process is to have effective assistance of counsel. The K.G.F. decision sets out the minimum requirements of effective counsel.

***{Tape: 1; Side: B}***

Whenever an individual is detained in the community for purposes of commitment, the petition requests that the individual be committed for up to 90 days. While at the Montana State Hospital, a second petition can be brought to renew the commitment for an additional six months. The third time this is done it may have a twelve months time frame.

**SEN. O'NEIL** questioned how the current system, under K.G.F., was working for persons who were being committed. **Ms. Roessman** conveyed that circumstances are different in every jurisdiction of the district courts. In some places attorneys counsel their clients to waive their hearings. In other places they are dusting off the books and once again are reading the civil commitment statutes. In certain areas, additional counsel has been retained to handle the cases.

**SEN. BRENT CROMLEY** questioned whether the decision in K.G.F. addressed the issue raised in the statute in regard to leeway on the part of counsel to consider his or her own opinion of the person's status. **Ms. Roessman** affirmed that it did. One of the problems addressed is that attorneys look at a person who is behaving strangely and listen to a doctor who wants the person committed. The attorney may have trouble communicating with his or her client and the attorney may not know what the client will do. Counsel may believe that the best thing for the client is for that client to go to the state hospital where the professionals know how to cope with these situations. K.G.F. held that counsel cannot use the best interest standard. Counsel must advocate for the client's wants. This needs to be done in criminal proceedings and it also needs to be done to the same extent in civil proceedings.

**SEN. CROMLEY** further questioned whether the amendment would modify the K.G.F. decision. **Ms. Roessman** explained there are potentially two evaluations a detained persons receives. One is ordered by the court and is conducted at the facility where the person is staying. The second evaluation may be requested by the person who is to be committed. They have a choice of the person performing the evaluation. The new language in the bill is inserted following the sentence that addresses the right to having the second evaluation. The K.G.F. decision addressed the person's right in the first court-ordered evaluation. This states that the person has the right to remain silent in that evaluation. If she were the attorney in a civil commitment proceeding in the post K.G.F. area, she would counsel her client that in the first evaluation they have an important opportunity to make a good impression and they may be able to have the

petition dismissed. This evaluation happens so quickly that oftentimes the attorney has not had a chance to communicate with his or her client. The new language in the bill states that an attorney should feel free to counsel the client to cooperate with the first evaluation. She believes the language is in the wrong place. She has no problem with the language. Unlike the situation in a criminal proceeding, there is no advantage to be gained in a civil proceeding by having the client refuse to cooperate with treatment.

**SEN. MIKE WHEAT** asked whether the K.G.F. decision outlined counsel's obligations in a civil commitment proceeding. **Mr. Petesch** believed the decision did so in terms of zealous representation in the commitment proceeding itself.

**SEN. WHEAT** further questioned whether the amendment was an attempt to rachet down zealous representation. **Mr. Petesch** maintained that it did not. His opinion is that the language is designed to address an issue that was not specially addressed in K.G.F. The issue is there may be a better opportunity in the zealous representation of a client in a civil commitment proceeding to not have the client committed if they have received expedited access to treatment pending the formal commitment proceeding. The client would have a better chance to convince the professional person that he or she is not a danger to self or others, which is the criteria for commitment.

**SEN. WHEAT** asked for further information in regard to placement of the language in the statute. **Mr. Petesch** explained the placement of the language in the statute by noting that this is where the client, in conjunction with counsel, has decided to request something.

**SEN. WHEAT** inquired whether the amendment was an attempt to establish the best interest of the client as a standard in civil commitment proceedings that are related to criminal proceedings. **Mr. Petesch** did not believe this was the case.

**SEN. WHEAT** questioned whether the language "counsel may determine" established a duty on the part of the attorney to make a health care decision on the part of his or her client. **Mr. Petesch** claimed this was not the intent of the language. The intent was that the attorney, after consulting with the client and in conjunction with the client, could determine that access to treatment is appropriate.

**SEN. O'NEIL** stated that the Montana Constitution, Article Seven, Section 2, stated that the Supreme Court may make rules governing appellate practice, practice and procedure for all other courts,

submission to the bar and conduct of its members. He questioned whether the Legislature had the authority to place this amendment in the statute. **Mr. Petesch** did not believe the amendment would violate that provision. This is an indication to attorneys that in following the rules adopted by the Court, this is still permissible.

**CHAIRMAN GRIMES** asked for a definition of the term "expedited access to treatment". **Mr. Petesch** maintained that the meaning is plain. It would mean that treatment is received as quickly as possible. The intent is it should not be court ordered or subject to a hearing. In K.G.F. the patient had been voluntarily receiving treatment. When she went off her medications and became the subject of this proceeding, she asked that she be allowed to consult with her personal attorney and her treating physician. This was denied. Under that fact situation, being allowed to consult with her treating physician and being returned to her medication may have prevented the K.G.F. case from coming forward. The intent of the amendment is that this should be permissible.

**CHAIRMAN GRIMES** questioned whether the wording "because of the threat of injury to self or others" would unnecessarily restrict the application. **Mr. Petesch** maintained the language was the standard for involuntary commitment. Because this involves an involuntary commitment proceeding, that standard was articulated.

**CHAIRMAN GRIMES** further asked whether the language needed to be in more than one section of the code. **Mr. Petesch** believed that stating it once would be sufficient.

**SEN. WHEAT** questioned whether there needed to be a reference to the commitment statutes that rely upon this standard of threat or injury to self or others. **Mr. Petesch** claimed that the language being discussed was a part of the civil commitment statute.

**Ms. Roessman** stated that she and **Ms. Lovitt** would be interested in working with **Mr. Petesch** to further develop the language. She further remarked that she would like the language to include the friend of respondent.

**Closing by Sponsor**:

**SEN. KEENAN** closed on SB 48.

***{Tape: 2; Side: A}***

**HEARING ON 25**

**Sponsor:** **SEN. JEFF MANGAN, SD 23, GREAT FALLS and BLACK EAGLE**

**Proponents:** **Anita Roesman, Montana Advocacy Program**
**Steve Rice, Lutheran Pastor, Interim Chief of Chaplains at the VA Medical Center in Miles City and the contract chaplain at Pine Hills Youth Correctional Facility**
**Donald Harr, Montana Psychiatric Association and Montana Medical Association**
**Chris Christiaens, Alternative Youth Adventures and the Montana Chapter of Licensed Social Workers**
**Al Davis, Montana Mental Health Association**
**Jim Hunter, Superintendent of Pine Hills Youth Correctional Facility**

**Opponents:** **Glen Welch, Montana Juvenile Probation Officers Association**

**Opening Statement by Sponsor:**

**SEN. JEFF MANGAN, SD 23, GREAT FALLS and BLACK EAGLE,** introduced SB 25 on behalf of the Department of Corrections. He stated that the old language on page 1, lines 19 through 22, would lead one to assume that we do not serve youth with serious health issues in these facilities. He provided a copy of the definition of mental disorder as found in 53-21-102, **EXHIBIT(jus07b11).** This bill clarifies the language by adding the language "including but not limited to major depression, schizophrenia, bipolar, or borderline personality disorder". Three main concerns have been raised. One was including the term "borderline personality disorder". He will provide an amendment in executive action asking for the wording to be removed. Another concern was found on page 1, lines 23-28. It was not the intention of this legislation to exclude those youth who, after commitment, are found to have suffered from one of these serious mental health issues. He will also provide an amendment which will leave the language in the statute. The third issue is what to do with the youth addressed by this legislation. Most people will agree that, philosophically, youth with serious mental health problems do not belong in secured facilities. Pine Hills and Riverside are not equipped to deal with serious mental health problems. It is his belief that this would involve approximately four or five youth per year who are suffering from major depression. He provided testimony from **Bonnie Adee, Mental Health Ombudsman, Governor's Office, EXHIBIT(jus07b12).** in favor of the bill. He

added that he would be providing an amendment to address the two issues in her testimony.

**Proponents' Testimony**:

**Anita Roessmann, Montana Advocacy Program,** provided a copy of the Serious Emotional Disturbance (SED) definition, **EXHIBIT(jus07b13).** The amendments **SEN. MANGAN** addressed in his opening statement will cover the problems in the bill. She agrees with **Ms. Adee** that the SED definition should be used instead of the definition for adults. She added that the existing language in the bill referred to the definition for mental disorder and also referenced the commitment statute for adults at 53-21-126.

The commitment statute has four criteria for commitment. The first is that the person is unable to take care of himself or herself. All children are basically unable to take care of themselves and meet their daily needs. The second is that the individual is currently dangerous. The third is that the individual is about to become dangerous. The fourth is that if the individual does not receive treatment, they will deteriorate to the point where they will need commitment. This is the criteria for outpatient commitment. The second and third criteria that involve dangerousness make sense in the civil commitment statute. Every child the court has adjudicated and is considering for placement in a correctional facility has dangerous behaviors. It would be more appropriate to review whether the child is considered to be SED. There is a bill draft which will allow probation dollars to provide a federal match for Medicaid. Youth treated at Pine Hills or Riverside have their treatment paid entirely from General Fund dollars. If the child is treated in the community, Medicaid will pay seventy-five cents for every dollar spent on treatment. The only thing Medicaid will not pay for is the residential placement. Residential placement in a therapeutic group home would amount to $32 per day. This is a lot less expensive than treating a child at Pine Hills.

**Steve Rice, Lutheran Pastor, Interim Chief of Chaplains at the VA Medical Center in Miles City and the contract chaplain at Pine Hills Youth Correctional Facility,** noted that he is also the appointed chair of the Youth Justice Council for Montana and holds a seat on the Board of Crime Control. He thanked the Legislature for their wisdom in providing the new facilities in Miles City. The youth who are there now are much more open and capable of participating in programs offered. The architecture allows for the programs to be more effective. He stated he must

have the mental capacity and ability to participate in the offered programs in order to the reap the benefit of what is being provided through our tax dollars. Pine Hills is not the place for a youth with a serious mental illness. An analogy he offered would be having all the children in Pine Hills confined to wheelchairs and only offer programs in a room that was up two or three steps. How could we be surprised that they were not able to be successful in participating in the program? As chair of the Youth Justice Council, he called the three-year planning meeting in December. Participants invited included state providers, private providers, Tribal leaders, attorneys, and legislators. There was no opposition to the intent of SB 25.

**Donald Harr, Montana Psychiatric Association and Montana Medical Association,** rose in support of SB 25 with the changes **SEN. MANGAN** mentioned in his opening statement. He said the earlier an individual with an illness has the problem addressed, the better the prospects are for successful treatment and recovery.

**Chris Christiaens, Alternative Youth Adventures and the Montana Chapter of Licensed Social Workers,** remarked that the amendments have made this a very workable bill. Using the SED criteria will address the proper placement of youth with problems. He further added that section 53-21-102 does not include alcohol and drug dependence.

**Al Davis, Montana Mental Health Association,** rose in support of SB 25 with the suggested amendments. National statistics suggest that 25 percent of all young persons entering the juvenile justice system or placed in secured care settings are experiencing a serious mental illness at some level. Since there is only a two or three year window to try to make adjustments in these young person's lives to keep them out of the deep end of the system and get them back in control of their lives, we urge the passage of SB 25.

***{Tape: 2; Side: B}***

**Jim Hunter, Superintendent of Pine Hills Youth Correctional Facility,** spoke in support of SB 25. He stated that treatment is offered to the less seriously mental ill youth. They have contract psychiatrists who consult with their staff and visit the youth. Those efforts are continued to be made. The seriously emotionally disturbed youth need to be addressed. Once the youth are placed at Pine Hills or Riverside, they are no longer eligible for Medicaid funding.

**Opponents' Testimony**:

**Glen Welch, Montana Juvenile Probation Officers Association,** presented his written testimony in opposition to SB 25, **EXHIBIT(jus07b14).**

**Questions from Committee Members and Responses:**

**SEN. CROMLEY** asked **SEN. MANGAN** if he planned to propose the amendment which would change the definition of mental disorder to that of serious emotional disturbance. **SEN. MANGAN** explained that he would like to discuss this with the Department of Corrections as well as the Mental Health Ombudsman. He wants to address the other issues regarding the adult system within the definition. He will have amendments prepared for executive action.

**SEN. CROMLEY** raised a concern that the bill would not accomplish very much because major depression and schizophrenia are both mental disorders. **SEN. MANGAN** explained that this would only involve four or five youth per year. The mental health system in the state does a wonderful job in attempting to work with our court system. Occasionally, youths fall through the cracks.

**SEN. MCGEE** questioned why the words "borderline personality disorder" were being removed from the language. **Dr. Harr** clarified that the reason they would like to have the term removed is that under the standards of diagnosis of youth and children the diagnosis of borderline personality disorder is not used. Youth may have borderline personality traits but this has not been developed to such an extent that it would be called an actual disorder.

**SEN. MCGEE** asked whether the term borderline personality disorder would only be used in reference to mature adults. **Dr. Harr** stated that he would have a difficult time stating that the term applied to "mature" adults. It would apply to those who are immature. It does apply to those who are chronologically adults.

**SEN. O'NEIL** asked whether the Committee could be provided the definition of severe and disabling mental illness. **SEN. MANGAN** stated that the information would be available for executive action.

**SEN. O'NEIL** questioned whether it would be better to change the name of the Pine Hills facility to a mental facility. If all the youth were sent to a mental facility, the state would then receive seventy-five cents of every dollar from the federal government. **Mr. Gibson** explained that the secured facilities are not eligible to receive Medicaid services. The Pine Hills

facility has a contract with a psychiatrist who is present once every three weeks. They also have a contract with a psychologist. They have therapists but the Pine Hills facility is not a mental health facility. If the youth are diagnosed prior to being placed at Pine Hills they are eligible for many Medicaid services which offsets the General Fund. They have approximately $170,000 for both facilities if a youth comes to the facility diagnosed as a severe mental health case. These youth are usually sent out-of-state since we do not have any state adolescent psychiatric beds. He added that many of the private psychiatric facilities may not be open to taking a youth from a correctional facility. Warm Springs had a unit for adolescents, which was closed in 1987. A facility was built in Billings and a few years later it was turned over to the private sector to a company called Rivendale. Later this became the women's prison.

**SEN. O'NEIL** questioned whether it would be possible to set up a unit at Pine Hills that was not secured. This would meet the criteria for Medicaid funds. **Mr. Gibson** reiterated that their facility is for the serious juvenile offender. It is necessary to have locked doors and a fence. This would disqualify the facility from receiving Medicaid funding.

**SEN. WHEAT** remarked that the opponent raised a concern regarding the current practice where the juvenile is first found guilty and then the decision is made in regard to placement. **Mr. Gibson** agreed that if, prior to adjudication, a determination is made that the youth is seriously mentally ill there is better access to Medicaid funding to place those youth in an appropriate mental health facility.

**SEN. WHEAT** asked whether the four or five youth being addressed were placed out-of-state. **Mr. Gibson** stated that there are still several youth at the Pine Hills facility with this diagnosis due to problems in finding providers willing to serve them. Youth have been placed at out-of-state facilities in the past.

**SEN. MCGEE** remarked that he agreed with **Mr. Welch's** statement that the court first deals with the youth who have committed a significant crime. He asked for further clarification in regard to the statement that the bill removes one part of the youth justice system from any involvement in treatment and rehabilitation of serious juvenile offenders. **Mr. Welch** explained that it would be good to have the youth diagnosed before they became a part of the youth justice system. The youth they serve are the ones who have already committed an offense. Once they are in the court system, they are diagnosed. They have already victimized people and committed crimes in the community.

The defense attorney will find a diagnosis for the youth. The youth will then continue to victimize our communities if a significant part, the correctional facilities, is taken out of the equation.

***{Tape: 3; Side: A}***

**SEN. MCGEE** questioned whether the bill could be amended to meet the concerns of the members of the Montana Juvenile Probation Officers Association. **Mr. Welch** remarked that he would need to see the amendments. Their concern is the youth who have no bottom line. Also, placement dollars are being decreased every year.

**SEN. MCGEE** requested that once the amendments were reviewed a memo be sent to the Committee advising their stance on the bill including the proposed amendments. **Mr. Welch** agreed to do so.

**CHAIRMAN GRIMES** asked who would determine that a youth is suffering from a mental disorder in these instances. **Ms. Roessman** explained that a professional person will provide the evaluation. The judge can appoint another professional to prepare an evaluation if he is not satisfied with what he has heard. When the judge feels that the evidence rises to a persuasive level, a finding will be made. The Youth Placement Committee makes recommendations to the judge.

**CHAIRMAN GRIMES** stated that the amendment will add a large amount of material to the code. **Ms. Roessman** claimed that several years of drafting were necessary to define serious emotional disturbance.

**SEN. MCGEE** questioned if there was a secure facility in Montana that also provided the mental health coverage necessary for these youth. **Kimberly Gardner, Administrator of Alternative Youth Adventures,** provided a handout which compared the SED with the DSM criteria and shows the number of youth in each category, **EXHIBIT(jus07b15).** They had been a provider for probation services to address at-risk youth who were referred through the Youth Court for mental health intervention. The severe cuts in the probation placement budget has not allowed them to use their services at this time. They have a five month back country program. Two months of the entire five months is spent in the wilderness. The other three months are spent in their treatment center in Boulder. Their program is the only program in Montana that provides services for the youth being addressed.

**Closing by Sponsor**:

**SEN. MANGAN** stated that Montana does not have facilities for these youth. The Alternative Youth Adventures Program would not take these youth because they need secure residential treatment. The cost of treating these youth at Pine Hills is prohibitive. He will do whatever he can to work with the Montana Juvenile Probation Officers Association. The bottom line is funding. Secure placement is available for these youth around the country. The system is set up for adults. Juvenile offenders cannot continue to be treated in the justice system under adult statutes. Some additional verbiage may be necessary to update our outdated laws.

## HEARING ON 44

**Sponsor**: **SEN. JERRY O'NEIL, SD 42, COLUMBIA FALLS**

**Proponents**: **None**

**Opponents**: **Jeff Weldon, Legal Counsel for the State Superintendent of Public Instruction**
**Erik Burke, Montana Education Association and the Montana Federation of Teachers**
**Bob Vogel, Montana School Boards Association**
**Dave Puyard, Montana Rural Education Association**
**June Hermansen, Montanans with Disability for Equal Access**

**Opening Statement by Sponsor**:

**SEN. JERRY O'NEIL, SD 42, COLUMBIA FALLS,** introduced SB 44. He remarked that the Montana Constitution presently states that equality of educational opportunity is guaranteed to every person in the State of Montana. This bill would provide exemplary education opportunity to the children of Montana. Equality means a condition of possessing substantially the same rights, privileges, and immunities being viable to substantially the same duties. When the more prosperous school districts in Montana subsidize the less prosperous school districts, more people are encouraged to live in the less prosperous school districts and this contributes to overall unemployment and poverty in Montana. Living in the country should include smaller, lower funded schools. This bill provides Montanans with a system of education that will develop the full educational potential of each person. Article Ten, Section 1(3), of the Constitution will still require that the legislature shall provide a basic system of free quality education and that it may provide various types of educational institutions and programs and the state's share of the cost of the basic system shall be distributed in an equitable manner. These requirements are more realistic and we should be able to

achieve them. Concerned communities should be allowed to give superior educational opportunities to their children.

**Proponents' Testimony**: None

**Opponents' Testimony**:

**Jeff Weldon, Legal Counsel for the State Superintendent of Public Instruction,** spoke in opposition to SB 44. Our Constitution contains a phrase that states that no person shall be denied the equal protection of the law. This is a vague concept but it has been debated for a very long time. The delegates to the Constitutional Convention debated this issue. The Chairperson stated that education occupies a place of cardinal importance in public realm. In Section 1, there is broad statement of the goal of education in our state. This goal is to establish a system of education which will develop the full educational potential of each person. Also included is a statement guaranteeing equality of educational opportunity within the state.

**Erik Burke, Montana Education Association and the Montana Federation of Teachers,** rose in strong opposition to SB 44. Equality of educational opportunity is one of the most meaningful and important phrases in our Constitution. Article Ten is well written and does set out a goal as well as great objectives for the state. Disabled students, students of color, economically disadvantaged students, academically talented students, and rural and urban students all benefit when the state commits to trying to provide an equal education for everyone. An equal funding system can help our students. This bill also threatens Montana's ability to retain critical federal funding. The No Child Left Behind Act was passed in January of 2002. The federal government has long maintained that states need to have some mechanism to ensure the equitable distribution of funding to its schools in order to qualify for federal funding.

In Illinois, some suburban schools spend well over $14,000 per student. Every imaginable academic opportunity was provided. At the same time in the inner city of Chicago, students were receiving an education that cost approximately $6,000 per student. The social and geographic dynamics this creates are something most Montanans do not want for their state. This assigns children to hit or miss opportunities where they cannot be assured of quality education because the equity provision is not mandated by their state.

**Bob Vogel, Montana School Boards Association,** rose in opposition to SB 44. They oppose the removal of the language on equality of educational opportunity from the Montana Constitution.

**Dave Puyear, Montana Rural Education Association,** remarked that as this state encounters the terrific budget problems and as we look towards the future of declining enrollments and the challenges of providing a quality education and an equal education, the problems become larger for the rural schools. Equality of education will become a critical aspect in the rural areas.

**June Hermansen, Montanans with Disability for Equal Access,** stated that opportunities take on an entire different context for persons with disabilities. One of the things this bill does not address is equality of educational opportunities for students with disabilities. If the language referring to equality of educational opportunities for all is removed, this will validate the individuals who do not validate students with disabilities.

**Questions from Committee Members and Responses**:

**SEN. GARY PERRY** noted that **Mr. Burke** stated that the school which received larger funding was able to produce better students. The statistics for Montana shows that one school in Montana receives $26,000 per student while schools in his county receives less than $6,000 per student. The Bozeman students rank high nationally. He questioned whether equality meant funding.

***{Tape: 4; Side: A}***

**Mr. Burke** stated that more funding is provided for rural schools because it requires more money to operate those schools and provide equality education. Because Montana has placed the funds in an equitable fashion, all the students have benefitted. Equality cannot be satisfied only under funding. Equality can include opportunities for disabled students as well a providing the best teachers.

**Closing by Sponsor**:

**SEN. O'NEIL** closed on SB 44. If a rule of measure for equality is funding, the district receiving $26,000 per student is providing superior education for its students. That is the reason for this bill. If the wording in the statute is left at "equality" instead of "superior" the $26,000 per student funding could be taken away.

## EXECUTIVE ACTION ON SB 68

**Motion**: **SEN. CROMLEY** moved that **SB 68 DO PASS.**

**Discussion**:

**Ms. Lane** provided a copy of the amendments, **EXHIBIT(jus07b16).** The amendments were proposed by **John Connor** and handed out during the hearing.

Executive Action was suspended and would resume following the Hearing on SB 133.

## HEARING ON SB 133

**Sponsor:** **SEN. ZOOK, SD 2, MILES CITY**

**Proponents:** **Karen Duncan, Juvenile Community Corrections Bureau Chief**

**Opponents:** **None**

**Opening Statement by Sponsor:**

**SEN. ZOOK, SD 2, MILES CITY,** introduced SB 133 which authorizes the Department of Corrections, rather than the Youth Court Judge, to select and appoint the juvenile parole officer representative on youth placement committees.

**Proponents' Testimony:**

**Karen Duncan, Juvenile Community Corrections Bureau Chief,** stated that she supervises juvenile parole officers. This bill addresses a management concern. There are 12 officers around the state.

**Opponents' Testimony:** None

**Questions from Committee Members and Responses:**

**SEN. WHEAT** stated that the statute addressed the makeup of the committee. A juvenile probation officer is appointed to the committee by the department. A consideration includes the costs involved in the juvenile probation officer's attendance at youth court placement committee meetings. **Ms. Duncan** clarified that the judge would still be appointing the probation officer but the department would like to appoint the parole officer.

**Closing by Sponsor:**

**SEN. ZOOK** closed on SB 133.

## EXECUTIVE ACTION ON SB 133

**Motion/Vote**: **SEN. MCGEE** moved that **SB 133 DO PASS. Motion passed unanimously.**

## EXECUTIVE ACTION ON SB 68

**Motion**: **SEN. CROMLEY** moved that **SB 68 DO PASS.**

**Discussion**:

**SEN. CROMLEY** remarked that the bill will bring the state statute in line with the U.S. Supreme Court decision in Ring v. Arizona which held several state's provision for the death penalty to be unconstitutional. The jury, and not the judge, will need to decide all the circumstances which lead up to imposition of the death penalty. The amendment addresses prior convictions.

**Ms. Lane** noted that the amendment is the same as the amendment provided by **John Connor** with the exception of not reinserting the term "incarceration" on page 2, line 6.

**Motion/Vote**: **SEN. CROMLEY** moved that **SB 68 BE AMENDED. Motion carried unanimously.**

**Motion/Vote**: **SEN. CROMLEY** moved that **SB 68 DO PASS AS AMENDED. Motion carried unanimously.**

## EXECUTIVE ACTION ON SB 44

**Motion**: **SEN. O'NEIL** moved that **SB 44 DO PASS.**

**Discussion**:

**SEN. WHEAT** stated that equality of educational opportunity is a term that has been litigated and there is an understanding of its meaning. Based on the testimony in regard to the Constitutional Convention, it was the clear intent of the framers of the Constitution. He did not see sufficient evidence to attempt to change the Constitution.

**SEN. CROMLEY** questioned the potential fiscal impact due to the cost of the election. **SEN. MCGEE** explained that this would be included as a ballot measure in the next general election.

**Vote**: Motion **failed 1-8 with O'Neil voting aye.**

**Motion/Vote**: **SEN. GRIMES** moved that **SB 44 BE INDEFINITELY POSTPONED. Motion carried 8-1 with O'Neil voting no.**

## EXECUTIVE ACTION ON SB 30

**Motion**: **SEN. O'NEIL** moved that **SB 30 DO PASS.**

**Discussion**:

**CHAIRMAN GRIMES** discussed a conceptual amendment. Other states have jury trials. We are weighing the privacy, confidentiality, and emotional interests of the child with the rights of the accused. We could allow for hearsay evidence from the child. The child would not need to appear in court. The amendment could state: "Such jury trial may include otherwise inadmissable child hearsay evidence if the court deems it necessary and if the court finds, outside the presence of the jury, that the time, content, and circumstances of the statements provide substantial guarantees of trustworthiness."

**SEN. WHEAT** questioned whether the hearing could simply be closed to the public and the same examination be made in front of the jury.

**SEN. CROMLEY** believed that this type of hearing would currently be a closed hearing. The concern was in having the information go to the jury. At a later time, the jurors may discuss the case.

**Ms. Lane** maintained that these hearings are closed to the public. The concern was that a judge should be hearing the allegations and not the jury because a jury member could someday start discussing the information in the community.

**CHAIRMAN GRIMES** stated that the problem he had with the bill was the affect on the family. Another concern is that there are no additional levels of review. The social worker and the immediate supervisor would be providing the review.

**SEN. MANGAN** asked whether the amendment provided that the guardian ad litem would be in the room during the testimony. **CHAIRMAN GRIMES** noted that this would be important.

**SEN. AUBYN CURTISS** raised a concern in regard to the time frame of the appointment of the guardian ad litem. **SEN. MANGAN** stated that the case mentioned in the hearing involved a 1997 case. The guardian ad litem system has grown since that time with every community in the state having a solid guardian ad litem program. Guardian ad litems are appointed post haste.

**SEN. CROMLEY** stated that he is generally opposed to the bill. We are addressing situations where there has been some cause to

believe that there has been abuse or horrible circumstances for the state to determine that someone is not fit to be a parent. These children will go to adoptive parents who will give them a lot of love. That is the other side of the coin which we need to consider. Adding a jury trial will cause long delays. He proposed a conceptual amendment in Section 4 to include the guardian ad litem consent.

**SEN. O'NEIL** questioned whether the proposed amendment would state that the guardian ad litem would need to consent to the jury trial.

**SEN. CROMLEY** clarified that there would then be three parties involved to include: the state, the parent, and the child.

**SEN. O'NEIL** stated that if the jury trial for a homicide was predicated on the prosecutor consenting to it, there would not be very many jury trials. He resisted the amendment because it would eliminate the benefits of the bill.

**CHAIRMAN GRIMES** was very sympathetic to the delay concern.

**Ms. Lane** explained that the Montana Supreme Court adopts rules of civil procedure. There is a rule of evidence which states that the Legislature can enact rules that are exceptions to the hearsay rule. An unsuccessful bill was introduced last year which would have enacted a child hearsay exception for criminal cases. This was a three page bill. She raised a concern about drafting an amendment that would accomplish what was attempted in three pages. Stating that all parties have to agree is a good idea. However, all the witnesses that appeared did not want to have a jury trial. Most of the witnesses were department employees. If the state was given the right to object to a jury trial, they would always do so. Perhaps the guardian ad litem should be able to decide whether a jury trial should be held.

**SEN. WHEAT** claimed that when the parental/child relationship is being severed by the state, there is usually some very bad conduct involved. He suggested allowing people to request a jury trial and extending the court's responsibility to balance the interests of the parents against the rights of the child and make a determination as to whether or not a jury trial is warranted. The factual circumstance will be different in each case.

**SEN. MANGAN** raised a concern in that one of the things he always hears in these situations is that the accused wants to confront the accuser. This was also brought out in the hearing. Regardless of the horrific stories, the system works. The Department of Family Services (DFS) works very hard to

investigate numerous claims in every community in this state. There are also complaints that the DFS did not take action. Something that may appear to be negligent or abusive is not addressed because it does not reach the third level.

***{Tape: 5; Side: A}***

**SEN. MCGEE** agreed with the conceptual amendment provided by **CHAIRMAN GRIMES.** He did not support **SEN. CROMLEY's** concept where parties need to agree to the jury trial. Either the person ought to have their parental rights terminated or they ought not. There are cases where parental rights should not be terminated. In criminal law, the person has a right to defend themselves as well as a right to see their accusers and a right to a jury trial. This is not a civil matter. How can someone take children away from a parent in a civil matter? A jury trial is the minimum that should be offered as an option to the person who is having his or her parental rights terminated. He does not have confidence in the social welfare system that is the police power in this regard. A phone call can be made with no name given and the DFS will be on the front doorstep to take the child away because in their mind it is the security of the child that is paramount. They may go back and investigate but they will take the child first. People who have not done anything wrong do lose their parental rights. There needs to be a level playing field for all parties. This is done by assuring that people have rights available to them which are guaranteed by the Constitution.

**CHAIRMAN GRIMES** questioned whether the members would prefer the alternative amendment which would not address hearsay testimony but would leave the decision to the trial judge. This would include consultation with the guardian ad litem.

**SEN. MCGEE** stated he would not be in favor of that amendment because the point he is trying to make is that the defendant needs to be defended. The person is innocent until proven guilty. The person should be able to request a jury trial.

**SEN. WHEAT** agreed with the concept of a jury trial when parental rights were taken away. The judge should be able to balance the situation of having a child testify in the courtroom.

**SEN. MCGEE** wanted to make sure that the defendant has a right to a jury trial and that the child is protected. He agrees with the concept that the court determines whether or not the child will sit before a jury. The allowance of hearsay evidence by the child is a good idea.

**SEN. WHEAT** questioned using the term "hearsay" evidence for this issue.

**CHAIRMAN GRIMES** explained that the definition he assumed was being used in Sen. Halligan's bill in the last session was that the hearsay evidence was not presented in chambers. This is the context he was using.

**SEN. WHEAT** stated that the jury could still have testimony from the child. The testimony would occur someplace other than the courtroom. Technically this would not be hearsay. It would simply be testimony.

**SEN. CURTISS** maintained that this is an important issue. She has had a judge tell her that they were really busy and needed to rely upon the recommendations of the social workers. Social workers are not infallible and we should all be guaranteed the right to defend ourselves when something this crucial is at issue.

**SEN. PEASE** raised a concern in regard to the Indian Child Welfare Act and how this bill would reflect on the Act. He had requested information on the Act but has not received it at this time.

**CHAIRMAN GRIMES** suspended action on SB 30.

**ADJOURNMENT**

Adjournment: 11:30 A.M.

_____
SEN. DUANE GRIMES, Chairman

_____
JUDY KEINTZ, Secretary

DG/JK

**EXHIBIT(jus07bad)**