MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on February 19, 2003 at 8:00 A.M., in Room 303 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. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused:
Sen. Gerald Pease (D)

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 & Date Posted: SB 389, 2/14/2003; SB 373, 2/14/2003; SB 400, 2/14/2003;
Executive Action: SB 400

HEARING ON SB 389

Sponsor: **SEN. DAN McGEE, SD 11, Laurel.**

Proponents: **Byron Roberts, Montana Building Industry Association**
Curt Chisholm, Montana Building Industry Association
Bill Pierce, Self
Roger McGlenn, Executive Director Independent Insurance Agents' Association of Montana
Roger Halver, Montana Association of Realtors
Jacqueline Lenmark, American Insurance Association
Greg Van Horssen, State Farm Insurance Company
John Agnew, Western States Insurance Agency
Al Littler, Self

Opponents: **Al Smith, Montana Trial Lawyers' Association**

Opening Statement by Sponsor:

SEN. DAN McGEE brings SB 389, an alternative dispute resolution bill for disputes arising between contractors and people who own homes. This bill will place in code a process by which an aggrieved homeowner who has an issue with construction, can inform the contractor so appropriate action can be taken prior to litigation. This is called "a right to cure" bill. **SEN. McGEE** is bringing this bill on behalf of the Montana Building Industry Association and has support from all members of the contracting and construction arena.

Proponents' Testimony:

Mr. Byron Roberts, representing the Montana Building Industry Association, explained this legislation was developed to recent and ongoing events in the insurance industry, including the consequences of 9-11 and the nationwide proliferation of construction defect lawsuits nationwide. This has forced a number of insurance providers out of the market and also had a substantial affect on the availability and cost of contractor liability insurance. This has become a serious problem over the last year. New contractors are being turned down for coverage and, when coverage is available, there is a substantial increase in the cost of liability insurance. To address these issues, Montana Building Industry Association (MBIA) formed a working group about two years ago. This group came up with three recommendations. The first was the development of model contract

provisions. These would include warranties, dispute resolution, concealed conditions, right to cure, and homeowner and builder responsibilities for avoiding mold in new construction. Also included was the recommendation to develop model contracts between contractors and subcontractors to reduce liability. There is a publication which contains these model contracts. **EXHIBIT(jus37a01).**

The second recommendation concerned the development and implementation of continuing education programs for builders on issues such as general liability, mold, and effuse (?). The third recommendation involved legislation. Right-to-cure legislation recently passed in Arizona, Washington, and California and helped significantly to bring the insurance industry back around. This legislation provides a builder with the notice of a defect and the opportunity to fix the defect. It applies only to construction damage and does not apply to tort actions alleging personal injury or death.

Curt Chisholm, representing the Montana Building Industry Association, submitted a flow chart explaining the notification process contained in Section 2, as well as an outline of limitation of damages contained in Section 4. **EXHIBIT(jus37a02).** **Mr. Chisholm** reviewed Exhibit 2 for the benefit of the Committee. **Mr. Chisholm** stated in 99.9 percent of cases where there is a defect in the construction of a home, the homeowner simply wants the defect fixed.

Bill Pierce, a residential building contractor in Helena, stated one of the primary reasons they are bringing forth this legislation is because the building industry is facing an insurance crisis. **Mr. Pierce's** insurance carrier would not renew his policy for the upcoming year, because the residential construction market was too risky due to huge and unreasonable lawsuit settlements from construction defect claims. Finally, he was able to locate a carrier, but the premium was 67 percent higher than the previous year even though his company had a clean record. The insurance underwriter informed him that the construction defect claims make this type of insurance policy risky. His company will pay $33,000 in general liability coverage, but will only build ten homes. **Mr. Pierce** feels this is unreasonable.

Roger McGlenn, Executive Director of the Independent Insurance Agents' Association of Montana, stated contractors' liability insurance is extremely difficult to find. This bill may not reduce rates because these rates are affected by many factors. However, he feels strongly that the passage of this legislation will help the increase of availability of insurance in Montana.

Roger Halver, representing the Montana Association of Realtors, stood in support of SB 389 for two reasons: This is a piece of legislation that seems like the most common-sense approach legislation this session. The second reason is because high-premium costs are passed on to homeowners, and Montana is in a crisis with affordable housing.

Jacqueline Lenmark, American Insurance Association, supports SB 389 because affordability and availability are problems in the insurance market for these types of premiums. Ms. Lenmark feels passage of this bill will increase availability.

Greg Van Horssen, State Farm Insurance Company, supports SB 389 and appreciates the dispute resolution provisions in the bill.

John Agnew, Western States Insurance Agency, listed insurance carriers in Montana which are no longer willing to underwrite general contractors' residential home building in Montana. Zurich, which was the largest policy provider, withdrew from Montana last April. Zurich had a substantial market share of this market, but decided to get out because of construction defects. Therefore, other carriers had to pick up the business. After a time, the other companies backed off the market. St. Paul and CNA, both large insurance companies who insure subcontractors such as plumbers and electricians, will not insure subcontractors who work on residential construction. **Mr. Agnew** spoke of a contractor in the Flathead Valley who paid $12,000 for insurance with Zurich. Zurich pulled out of the market, so the contractor was required this year to pay a premium of $120,000. The contractor declined the insurance.

Al Littler, a contractor from Billings, Montana, testified that in 1974 he and several others formed the Homeowners' Warranty Council (HOW Council) and developed a system to provide a written warranty on the product they built. Their subcontractors and supplies would stand behind that warranty. If there was a problem with the house, contractor and consumer would resolve the problem with the help of a panel of contractors. Every house he sells has a long written warranty stating what is covered, what is not covered, the contractor's responsibilities, and the responsibilities of the consumer. Sometimes, homeowners are responsible because they do not take care of the home. Builders are responsible for their work. There is no such thing as a standard one-year warranty. The written warranty must be provided by the builder. This bill proposes what has been successfully used in the marketplace for decades. SB 389 is good for builders and consumers.

Opponents' Testimony:

Al Smith, Montana Trial Lawyers' Association, questions whether the insurance industry is going to be writing Montana's laws and if their pricing practices will govern how laws are interpreted. **Mr. Smith** feels the insurance industry needs the reforms. **Mr. Smith** has questions with the limitation on damages for unforeseen acts of nature. He feels the contract standards should be in there as well. Also, **Mr. Smith** is concerned about Section 3, on page 5, regarding admissibility and why that section is needed. Also, in Section 4, he is not clear why the damages need to be specifically set out. **Mr. Smith** feels the Legislature should look at what is best for the people of Montana as opposed to just what the insurance industry dictates. **Mr. Smith** feels it is the insurance industry driving the increase rather than the experience rating in Montana. **Mr. Smith** feels most construction defects can be solved without litigation. **Mr. Smith** wonders what would happen if a person contracts for work which is above the industry standard and feels the cure should apply to the work you contracted for.

Questions from Committee Members and Responses:

SEN. WHEAT stated to **Mr. Pierce** that he senses **Mr. Pierce** has operated a pretty good business with virtually no major claims. Therefore, the premiums **Mr. Pierce** pays are not based on his claim history. It is, in effect, being driven by the insurance industry and whatever is happening across the country.

Mr. Pierce agreed, but he believes, fundamentally, the increase has been driven by over-zealous lawsuits and attorneys pursuing things to an unreasonable degree. **Mr. Pierce** feels the builders and homeowners should settle down and work on reaching a reasonable solution to construction defects. Contractors and homeowners can work out solutions for much less money.

SEN. WHEAT asked **Mr. Pierce** if this was a problem in the state of Montana. **Mr. Pierce** has had a number of his colleagues around the state who have said they feel disputes they were involved in could have settled if they would have been able to speak to the owner before the disputes got out of hand.

(Tape : 1; Side : B)

SEN. WHEAT summarized what he believes the building industry is seeking, which is if there is going to be a claim, the contractor should be notified, and then there should be an opportunity for

mediation or resolution of that dispute before a lawsuit is filed.

Mr. Pierce confirmed **SEN. WHEAT's** understanding is correct and they do not mean to preclude litigation if the contractor cannot adequately cure the defect.

SEN. WHEAT asked **Mr. Agnew** if he has any statistical information which demonstrates there is a crisis in Montana driving up the liability rates.

Mr. Agnew is not saying the data does not exist, but he does not have it. The issue is more of a spillover from outlying areas, and the fact is Montana only has a little less than a million people, but we are painted with the same brush as everyone else around the country. The insurance industry feels that what is happening around the country will eventually happen in Montana and there just is not enough insurance pool dollars to take care of those issues in Montana.

SEN. GARY PERRY asked **Mr. Halver** to tell him what effect the increased insurance costs to the builders have on affordable housing.

Mr. Halver spoke on behalf of the Realtors and the contractors and said as a finishing contractor his liability premium went from $400 per year to $700 a year, and when he renews his policy, he will have to pass that cost on to his customers. As far as the Realtors are concerned, impact fees have to be passed on, as well as increased insurance costs.

SEN. PERRY wanted to know if the insurance companies' rates are determined over a pool of several states' experiences and not just Montana's.

Mr. Agnew responded they are.

SEN. PERRY then quoted **Mr. Smith** and his reference to the laws being written by insurance companies, and his statement the insurance industry is driving the high premiums. **SEN. PERRY** would like to know if the insurance companies are the problem.

Mr. Agnew stated it comes down to insurance rates are actuarially set by past history. The rate is set with the forethought and knowledge there will be a claim. There must be enough money in the pool to pay that claim. When it looks like there may not be enough money in the pool to pay all the claims, then the rates go up. Insurance rates are set knowing the company will some day have to pay a claim.

SEN. PERRY asked if there was the threat of a lawsuit inherent in a claim and, if there is a consequence for a person to bring forth a claim, is there a potential lawsuit if the person bringing the claim or lawsuit loses.

Mr. Agnew responded the person filing the claim can bring a lawsuit. The negative consequence of losing the lawsuit is the claimant is not made whole.

SEN. JEFF MANGAN does not see a formal mediation or dispute resolution procedure provided in the bill. **SEN. MANGAN** noted the language on p. 7, lines 14-15, and wanted to know if you enter into a formal mediation, do sections 1 through 4 not apply with regard to timelines.

Mr. Chisholm stated the language was purposely placed in the bill because they did not want to infringe on the sanctity of a contract relationship already in place. They are educating their members and providing model contracts that contain dispute resolution procedures. Hopefully, this will be perceived favorably by companies writing liability insurance. In many instances in other states, the contractor was never given notice of the defect and, therefore, not given a chance to remedy the situation. They see this same behavior creeping into Montana. That is why they are trying to provide a notification process and a number of options for the contractor to respond.

SEN. AUBYN CURTISS told of a company in Libby that just folded because their insurance carrier would no longer insure them from alleged liability from asbestos exposure. **SEN. CURTISS** asked if this is an emerging problem in Montana and whether it is driving insurance rates nationwide.

Mr. Agnew stated insurance is a necessary evil because as businessmen, we cannot assume the risk. He does not see the insurance companies pulling the plug on industry after industry in Montana. Asbestos inclusions have been on policies for years, and he is not clear why the company closed down because of that exposure.

SEN. CURTISS asked who performs the inspections, if there are enough inspectors to do it in a timely manner, and who pays for the inspections.

Mr. Chisholm responded the inspections will, hopefully, be performed by the contractor at the contractor's cost. Once notified of the construction defect, they are hopeful the potentially responsible party will be allowed an opportunity to

inspect, at their cost, to determine how the defect can be fixed, or possibly even to dispute the alleged defect.

SEN. JERRY O'NEIL stated he may have a potential conflict of interest since the bill may give more business to mediators.

Closing by Sponsor:

SEN. McGEE closed saying this is a common-sense approach to the existing problem. Today's reality is there are insurance problems and increases and litigation problems and increases. The builders are caught in the middle. The ability of builders to purchase insurance is going by the wayside. This will allow the builders to fix problems through dispute resolution. To a degree, it is driven by insurance and lawyers. This bill is trying to help builders build homes in a cost-effective way.

HEARING ON SB 400

Sponsor: **SEN. KEN TOOLE, SD 27, Helena.**

Proponents: **Mike Halligan, Washington Corporation**
Pete Lawrens, Montana Rail Link
Pat Keim, Director of State Government Affairs, The Burlington Northern and Santa Fe Railway Company

Opponents: **None.**

Informational Witnesses:

Opening Statement by Sponsor:

SEN. TOOLE opened by stating there was a statute last session which tried to prevent railroad vandalism. This bill decreases and adjusts some of the penalties. Also, this bill will eliminate the sunset and make the statute permanent.

Proponents' Testimony:

Mike Halligan, representing Washington Corporation, informed the Committee the sunset was placed on the bill because they needed to see if railroad property really needed special legislation. The Montana Supreme Court and the United States Supreme Court in 1907 recognized the need for special legislation for railroads because of the hazardous nature of operating a railway, the protection of its employees, and the safety of the public. There are 18 trains a day which go across Montana Rail Link property

and at any given time, there are about 8,000 to 10,000 cars in the various yards. They are trying to make sure there is a serious deterrence to protect those cars. The repealer will bring back permanently in the statutes the other provisions of the vandalism act.

(Tape : 2; Side : A)

Pete Lawrens, representing Montana Rail Link, used to be a police officer and has a fair degree of familiarity with crime. He works closely with Missoula law enforcement to protect railroad property. Montana Rail Link has one stretch of property east of Billings which incurred more than $10,000 in vandalism every year for a five-year period. This dollar amount has been reduced to $2,000 with the passage of legislation last session. **Mr. Lawrens** attributes the decrease to Operation Lifesaver training provided to student drivers and others across the state. This training emphasizes the need to protect railroad property and the potential for bodily injury. A small amount of vandalism to railroad property or equipment can have consequences in the millions of dollars. In the two years this law has been on the books, Montana Rail Link has had eight successful prosecutions under the Railroad Vandalism Act. This enabled county prosecutors to relay to the community how important it is to keep railroad property safe.

Pat Keim, Director of State Government Affairs, for The Burlington Northern and Santa Fe Railway Company (BNSF), which operates over 2,100 miles of trackage in Montana and has over 2,000 employees. The employees and track are exposed to dangers daily from vandalism. The statute has been helpful in educating the public and working with law enforcement to reduce vandalism. **Mr. Keim** emphasized the only thing this bill does is reduce the penalty levels because they are not trying make major criminals, and also remove the sunset clause. **Mr. Keim** feels the bill is accomplishing its purpose.

Opponents' Testimony: None.

Questions From The Committee and Responses:

CHAIRMAN GRIMES asked **Mr. Halligan** if the reduction of penalties will give law enforcement a big enough hammer.

Mr. Halligan stated it would bring the penalties more in line with regular misdemeanor and felony statutes.

SEN. CURTISS expressed concern whether now is the proper time to be decreasing penalties in light of the fact Homeland Security is becoming more prevalent.

Mr. Halligan replied terrorism is very important, and they are very vigilant in being tied into the national alert system. **Mr. Halligan** responded the felony provision is still there and the 40 years is consistent with the goals of Homeland Security.

Closing by Sponsor:

SEN. TOOLE did not expound further and closed the hearing on SB 400.

EXECUTIVE ACTION ON SB 400

Motion/Vote: **SEN. McGEE** (?) moved **SB 400 DO PASS.** The motion **carried unanimously.**

EXECUTIVE ACTION ON SB 389

Motion/Vote: **SEN. PERRY** moved **SB 389 DO PASS.**

Discussion:

CHAIRMAN GRIMES asked **SEN. McGEE** if it is his intent that page 2, line 12, for professional to mean licensed and whether a person who is a home contractor would be included.

SEN. McGEE stated it means licensed in that particular section, but would not apply in the case of someone doing their own work, because how would you have an action against yourself.

Valencia Lane responded that **CHAIRMAN GRIMES** is concerned about non-licensed people and whether they would have protection of the act or if the homeowner builds his own home and sells it.

SEN. McGEE replied then that was not his intention.

CHAIRMAN GRIMES stated for the record this bill would not apply to anyone other than licensed professionals.

SEN. O'NEIL commented that he did not believe the word licensed needed to be in there because of current licensing laws. **SEN. O'NEIL** could envision wanting to hire someone who is not a contractor and this should apply to them as well.

SEN. WHEAT objected to taking executive action on **SB 389** because there are some serious issues he would like to take a look at.

Motion: **SEN. PERRY** withdrew his motion.

Note: **SEN. MANGAN** was excused from the remainder of the meeting due to illness.

HEARING ON SB 373

Sponsor: **SEN. RICK LAIBLE, SD 30, Victor.**

Proponents:
Rep. Verdell Jackson, HD 79, Kalispell
Julie Millam, Executive Director, Montana Family Coalition
Gilda Clancy, Eagle Forum of Montana
Harris Himes, Big Sky Christian Center
Dan Makowski, Superintendent, Flathead Valley Christian School
Ray Fuller, Superintendent, Rocky Mountain Christian High School
Earl Reimer, Superintendent, Flathead Valley Christian School
Clint Morey, Principal, Valley Christian School
Dudley Beard, Golf Professional at Meadowlark Country Club, Great Falls
Nicole Davis, Self
Shane Hoffner, Self
Rachel Davenport Haynes, Self
Trent Layton, Self
Steve Jackson, Self
Jackie Bryant, Flathead Valley Christian School
Paul Glidewell, Flathead Valley Christian Board
Lisa Ramsey, Flathead Valley Christian School
Richard Allen, Flathead Valley Christian School

Opponents:
Steve Meloy, Executive Secretary, Board of Public Education
Jim Haugen, Montana High School Association
Bob Vogel, Montana School Boards Association
Eric Feaver, Montana Education Association
Jock Anderson, Montana High School Association

Opening Statement by Sponsor:

SEN. LAIBLE brings SB 373, which addresses interscholastic high school sports. **SEN. LAIBLE** read from the Montana High School

Association Handbook regarding the purpose of the Montana High School Association (MHSA) and its goals regarding athletes and athletic events and programs. **SEN. LAIBLE** pointed out the Handbook states the MHSA fully supports the concept of equal opportunity for the youth of the state of Montana and that there will be no discrimination with regard to gender, religion, race, ethnic origin and activities sponsored by the Association. However, within the interpretation of the Handbook, it states any school not accredited by the State Board of Public Education is not eligible. **SEN. LAIBLE** feels this is contradictory. SB 373 is not targeted at the MHSA, but is against the use of tax dollars and public funds for membership within an association which discriminates against similar schools with similar kids. **SEN. LAIBLE** feels youth in private schools are not different than youth in public schools. MHSA is funded by taxpayer dollars to supervise, control, and regulate sports activities. Part of the reasoning of why they do not include private school students is the argument that the teachers and schools are not accredited and the proponents are prepared to address these issues. **SEN. LAIBLE** asked the Committee to remember that the parents of private school kids also pay property taxes for public school students to participate in the sports programs managed by the MHSA; the very programs their children are not allowed to participate in. **SEN. LAIBLE** feels the MHSA has discriminatory practices against a business competitor. **SEN. LAIBLE** proclaimed private schools are not looking for a free ride and are prepared to pay their fees. **SEN. LAIBLE** feels the MHSA cannot have selective membership practices, and public tax dollars cannot be used to support discrimination against private schools. **SEN. LAIBLE** sees the real issue as MHSA punishing young men and young women who attend private schools. This is not about schools, parents, or MHSA. It is about kids who are unable to participate because of educational choices their parents made for them. We are sending a message to the kids who attend private schools that they are not as important as kids attending public schools. There are approximately 1,200 to 1,600 high-school age men and women who attend private schools. These kids will never have the opportunity to participate in this program, will be limited in their access to statewide competitive events, and will even be denied access to some college scholarships. This can all be changed by sending a message to the Board of Education that discrimination against private schools and the students who attend them will no longer be tolerated.

Proponents' Testimony:

Rep. Verdell Jackson, HD 79, Kalispell, considers himself an expert on accreditation. He has been through the Association of Christian School's International Accreditation process. **Rep.**

Jackson feels the difference in the accreditation processes and requirements is one of the main issues. **Rep. Jackson** believes MHSA discriminates by requiring accreditation by the public school system before membership is granted. **Rep. Jackson** submitted written testimony in favor of SB 373. **EXHIBIT(jus37a03).**

(Tape : 2; Side : B)

Rep. Jackson gave examples from the public school accreditation system, citing elementary schools with four or more teachers, must sign a teacher with a minimum of nine credit hours in professional library training at a ration of one full-time librarian to 800 students. Another standard is for a minimum equivalent of one full-time counselor for each 400 kids. There can be no more than 20 kids in kindergarten and first and second grades. In one-teacher schools, the maximum class size is 18. These are input standards used in the public schools. Private schools would have difficulty operating within these standards because they use a lot of volunteers and aides, and they need to use their teachers in such a way as to maximize learning.

Julie Millam, Executive Director of Montana Family Coalition, submitted written testimony, **EXHIBIT(jus37a04),** in support of SB 373.

Gilda Clancy, representing Eagle Forum of Montana, stands in favor of SB 373.

Harris Himes, Big Sky Christian Center, asked the Committee to support SB 373.

Dan Makowski, Superintendent of Flathead Valley Christian School, submitted written testimony focusing on taxes, separation of church and state, accreditation, and current conditions. **EXHIBIT(jus37a05).**

Ray Fuller, Superintendent of Rocky Mountain Christian High School, submitted written testimony in favor of SB 373. **EXHIBIT(jus37a06). Mr. Fuller** finds it interesting that in 1950, 98 percent of the country was literate. In contrast, by the year 1990, only 81 percent of the country is literate. This was accomplished by a system that is "accredited." Only 37 percent of Montana's fourth grade students can read at or above grade level. Only 37 percent of high school seniors who graduate can read at above grade level. One can only conclude accreditation is not the catch all, end-all in making sure standards are maintained. **Mr. Fuller** would argue that free enterprise has a great deal to say about the market place. In America, if you

build a bad product, you will go out of business. This philosophy applies to private schools as well. In addition, **Mr. Fuller** pointed out that private education is not the enemy. **Mr. Fuller** closed stating private education benefits the state in many ways and SB 373 should be passed.

Earl Reimer, Superintendent of Valley Christian School, explained there are like schools in Kalispell, Bozeman, Helena, Great Falls, and Billings. **Mr. Reimer** is excited about SB 373 and feels it is an incredible opportunity to right a wrong. This will bring the same opportunities afforded to kids, who go to public schools, to kids in private schools. This bill will cost the state nothing and will add approximately $15,000 to MHSA in membership dues. **Mr. Reimer** submitted written testimony in support of SB 373. **EXHIBIT(jus37a07).**

Mr. Reimer also submitted SB 373 Supportive Documentation Package **EXHIBIT(jus37a08).**

(Tape : 3; Side : A)

In addition, **Mr. Reimer** submitted documentation from other states regarding accreditation. **EXHIBIT(jus37a09). EXHIBIT(jus37a10).**

Clint Morey, Principal, Valley Christian School, feels public money, with most of the fees going into MHSA, are public funds. Most of the people who attend MHSA are public school teachers who are paid by tax dollars. People who vote are public school people. Therefore, he feels the bill addresses the right issue: Public funds should not be used to discriminate. To say a school has to be OPI accredited is wrong. Not being OPI accredited, their construction program is taught by a contractor. This teacher, obviously, is not going to go back to school and get a teaching certificate. They also have a computer science department taught by someone who does networks for a living. Journalism is taught by an editor of *The Missoulian.* These type of experiences could not be offered under state accreditation. By choosing not to become accredited, they are denied the right to participate in sports that they, as taxpayers, pay for. **EXHIBIT(jus37a11).**

Dudley Beard, Golf Professional at Meadowlark Country Club, Great Falls, hosts the Great Falls High School Invitational and the State High School Tournament. In the last 17 years, use of the club and course has not cost the MHSA or any of the local high schools, any money. He has a 13-year-old son and an 11-year-old daughter who want to play basketball or golf. Currently, neither will be able to participate since they attend Christian school.

This does not seem fair to **Mr. Beard**, and he urged the Committee to support SB 373.

Nicole Davis, a senior at Valley Christian High School, testified that last fall she auditioned for the Missoula Youth Symphony. She was one of 11 flautists who auditioned for the two available spots. She was one of the three finalists, but the other two had attended all-state band. Therefore, she was passed up. Since all-state band is an MHSA event, **Miss Davis** was unable to attend because she is a student at Valley Christian High School.

Shane Hoffner, a junior at Valley Christian High School, submitted written testimony, **EXHIBIT(jus37a12)**, telling of his experience in track and cross-country.

Rachel Davenport Haynes, a senior at Valley Christian High School, testified about her lack of athletic and scholarship opportunities while attending a Christian high school. **Ms. Haynes** submitted her written testimony as **EXHIBIT(jus37a13)**.

Trent Layton, a junior at Valley Christian High School, has participated in athletics since he was in the fifth grade. This past year, **Mr. Layton** averaged 17 points per game in basketball and shot over 80 percent of his free throws. Since MHSA's decision not to allow them to play in post-season events, he knew he would be unable to play college basketball since college scouts overlook schools which are not accredited by MHSA. Valley Christian High School has a number of very talented athletes and musicians and **Mr. Layton** feels they deserve to have a chance to compete in district and state tournaments. **Mr. Layton** would love an opportunity to participate in post-season events.

Steve Jackson, a volunteer tennis coach at Valley Christian, stated most of the teachers at Valley Christian are paid about one-half of what their public school counterparts are. **Mr. Jackson** pointed out the opponents to this bill will be lobbyists, not students. From 1996 until 2000, the boys tennis team at Valley Christian were state champions in Class B-C. In the year 2001, they were not allowed to compete. The tennis team can play during the season, but is precluded from district or state championships. **Mr. Jackson** attended both public and private schools in Colorado, and informed the Committee that Colorado has included all students in their athletic and activity association for the past 55 years. There is no distinction between private school and public school. **Mr. Jackson** would like to see Montana do the same.

Jackie Bryant, a teacher at Valley Christian School in Missoula, graduated from a public school and attended Montana State

University on a track scholarship. This was the only way she would be able to obtain a college education. Currently, **Ms. Bryant** is the track coach at Valley Christian. Two years ago, they qualified ten athletes to go to the state meet in Great Falls. Seven out of those ten students were freshman. One of the young men was a freshman, ran 400 meter event, and placed fifth overall with a time of .50. **Ms. Bryant** remarked this time was quite significant. In November 2001, MHSA dropped Valley Christian from their organization. Since the MHSA would not allow the students to be part of a meet with more than one team involved, the athletes were shattered. They did participate in an indoor meet in Bozeman and they did very well. The second time they went to Bozeman for an indoor meet, the bus went off the road and hit a group of trees. The impact resulted in the death of one of their students. In addition, two students were thrown from the bus, one of which was the 400-meter hopeful, who would have to learn to walk again.

Paul Glidewell, a Valley Christian Board member, is the father of four children, one is an infant, one has a talent for academics, one has a talent for music, and one has a talent for athletics. His children are excited about their futures, and he is excited about SB 373 so his children will not be denied opportunities.

Lisa Ramsey, a school counselor at Valley Christian School, stated that MHSA serves an important role in acknowledging achievements for Montana students. Students excluded from MHSA have lost a significant opportunity for public record and acknowledgment of their accomplishments. Students have lost points on scholarship applications because they are not allowed to compete on the state level. In addition, academic all state is no longer acknowledged for their students. Valley Christian musicians and athletes have lost significant opportunities by being excluded from MHSA.

Richard Allen, a board member of Valley Christian High School and a parent of two students, would like the Committee to keep in mind the motto, "For all the Children," no matter what school they go to.

Opponents' Testimony:

Steve Meloy, Executive Secretary of the Board of Public Education, opposes SB 373 on behalf of the Board of Public Education, which is the body given authority by the state Constitution and state law to set requirements for the schools. The Board of Public Education considers its standards to be the minimum requirements. In 2001 Valley Christian School filed suit against MHSA for adhering to the condition that in order to be a

member of their organization, they must be a high school accredited by the Montana Board of Public Education. At that time, accreditation was available to Valley Christian. Today, this accreditation is still available to public and private schools. There are currently ten private schools accredited by the state of Montana. The Board of Public Education has a process for any school to apply for performance-based accreditations. This process involves self-evaluation, peer review, and on-site visitations. This will allow schools to meet accreditation standards by showing, through the students' work, that it provides quality education. The school improvement plans are leaning towards performance-based or student-outcome accreditation. During the time of this lawsuit, the school was notified by the Board of Public Education that failure to have a state-certified teacher in the position of a high school chemistry teaching position placed its status in jeopardy. Valley Christian had a choice to replace that teacher or lose its accreditation. They chose to forfeit their accreditation and it was revoked. The school then filed a petition and it was denied by a district court judge.

(Tape : 3; Side : B)

The court ruled it is reasonable for MHSA to require that all members be accredited by the State of Montana Board of Public Education. The board recognizes that participation in interscholastic sports is an integral part of the system of education in Montana. The board further feels that to allow athletes to participate, who are not from accredited schools or are accredited by non-recognized authorities, would create an unfair playing field for those schools that do adhere to the board's standards. A great athlete who could not achieve participation in athletics in an accredited school, may find it to the playing field in a school with less-stringent standards. **Mr. Meloy** feels accreditation is what guarantees equity state wide.

Jim Haugen, representing the Montana High School Association, testified that in the 1920s the associations were formed because they needed standards for those people who left as young men and came back as older young men from the war. This caused problems with academic rules, transfer rules, and athletic rules. These same problems were repeated with WWII. **Mr. Haugen** has worked for the MHSA for forty-five years and has been to every annual meeting since 1964. The basic premise with every rule that is made, changed, or deleted, deals with all students meeting some kind of standard. This makes for fair, even ground in all programs.

Bob Vogel, representing the Montana School Boards Association, believes SB 373 sets a bad precedent since the Legislature would be prohibiting any school district from being a member in any organization. Not only an organization that discriminates or participates in unlawful activities, but an organization that must adopt a policy that allows certain non-public schools to be members. **Mr. Vogel** drew the Committee's attention to the definition of non-public school on line 19. Therefore, **Mr. Vogel** feels the Legislature would mandate or prohibit every high school in Montana from belonging to the Montana High School Association. SB 373 places activities and athletics over academic standards and accreditation. **Mr. Vogel** believes this sends a poor signal to students and parents. Article X, Section 8, of the Montana Constitution vests the supervision of schools in each school district with school district trustees. SB 373 turns a portion of that control over to the Legislature. **Mr. Vogel** feels if the Legislature gives up some of that control, there will be other good causes in the future. This is the bad precedent set by SB 373.

Eric Feaver, representing the Montana Education Association, stated SB 373 says choice has no consequences. Any school, private or public, could ignore standards and still participate in MHSA activities. **Mr. Feaver** feels the debate is about one standard because under the Board of Public Education rules of school accreditation all standards may be alternatively provided except one. That one standard is that teachers must be certified and endorsed. This is an inviolate standard. Valley Christian chose not to comply with that standard and, therefore, they could not meet the standards of the Montana High School Association. That was the consequence of a choice. They could choose, as they have in the past, and employ teachers who are certified, endorsed, and licensed to practice the profession of teaching. **Mr. Feaver** emphasized that the Office of Public Instruction does not accredit schools and does not draw up the rules governing teacher certification. **Mr. Feaver** wishes people would not beat on the Office of Public Instruction for implementing decisions made by the Board of Public Education. This board is extraordinarily important with accountability to the citizens of this state to provide the standards for meeting our constitutional obligation to our students. **Mr. Feaver** stated that the federal government with the "No Child Left Behind Act" dictated or mandated to all schools that all teachers shall be highly qualified. Congress then recognizes highly qualified as being those persons who have actually graduated with a B.A. or B.S. in the disciplines they teach. Congress recognizes standards that reach beyond what is required in Montana.

The one section of the bill which **Mr. Feaver** feels is truly troublesome, lines 19-20. **Mr. Feaver** reiterated **Mr. Vogel's** concerns about the definition of "non-public" school and feels it is way too broad. **Mr. Feaver** stated for $50 you can get accredited on the Internet for just about anything. **Mr. Feaver** suggested getting some definition as to what a private accrediting agency might be if the bill is to have any life at all.

Jock Anderson, representing the Montana High School Association, submitted written testimony, **EXHIBIT(jus37a14),** in opposition to SB 373. As to the suggestions that MHSA discriminates against private schools, **Mr. Anderson** emphasized the MHSA has a very important component of private schools within its membership since its formation in 1952. Great Falls Central, Manhattan Christian, Billings Central, and Mount Ellis Academy in Bozeman are all members of MHSA, subject only to accreditation by the state of Montana. In addition, **Mr. Anderson** warned if the Committee were to adopt a premise that private accreditation should be an alternative to public accreditation, there is no such thing as private accreditation in the sense of having any standards.
In the 1980s, MHSA tried private accreditation and was voted out by the membership. Notwithstanding the fact that MHSA serves a very public service and is joined at the hip with the public schools and private school members, MHSA remains a private nonprofit corporation and is a voluntary association of its members. Therefore, on two levels, the members of the association have the right to establish its own standards. Secondly, authority over public schools is vested in local school boards. Member schools each have a vote and they have addressed the subject of private accreditation many times and have rejected it. **Mr. Anderson** pointed the Committee to the part of his written testimony which addresses the unconstitutionality of SB 373 and the case of Kaptein v. Conrad Public Schools. In this case, three Supreme Court Justices thought forcing a public school to include a private school in extracurricular activities was a violation of Article X, Section 6, of the Montana Constitution which deals with the separation of church and state. **Mr. Anderson** also advised the Committee that passage of this bill would require the Montana High School Association to hold a special meeting before the start of the next school year at an estimated cost of between $100,000 and $150,000.

Questions from Committee Members and Responses:

SEN. WHEAT asked **Mr. Meloy** if it was the Board of Public Instruction that does the accreditation for all public and private schools in Montana. **Mr. Meloy** corrected him, responding

it is the Board of Public Education, which consists of seven members who are governor appointed. The Office of Public Instruction (OPI) is attached to the Board of Public Education for administrative purposes. OPI is the entity which implements accreditation and certification, makes the site surveys, and issues the teaching certificates.

SEN. WHEAT asked **Mr. Meloy** if he had a list of private accrediting agencies which private schools can utilize other than OPI. **Mr. Meloy** responded he does not, because Montana set up a $3 or $4 million process to allow the board to be the accrediting agency. The board does not recognize any other entity as an accrediting body.

SEN. WHEAT then asked if there is an ability for a private school, such as Valley Christian High School, to seek a waiver if they have someone teaching a class who may be qualified in every sense, except they are not certified as a teacher.

Mr. Meloy was not aware of any waiver process for certification.

SEN. WHEAT asked if there was any way for Valley Christian High School to have complied and received accreditation, other than hiring an accredited chemistry teacher.

Mr. Meloy stated that was the only issue he was aware of, and there was no other way they could have continued receiving accreditation from the Board of Public Education other than hiring an accredited chemistry teacher.

SEN. WHEAT asked if the person teaching chemistry was a chemist.

Mr. Meloy stated he did not know, and elaborated that he has a 13-year-old and he finds it difficult helping her with seventh-grade math.

SEN. WHEAT related that Valley Christian School athletes can participate at MHSA events during the regular season, but not in post-season events and wanted to know why the distinction.

Mr. Meloy referred the question to **Mr. Haugen.**

Mr. Haugen stated the purpose of the rule had to do with when an accredited school played against a school which was not accredited and did not equal the same standards. If the accredited school brings in two other schools in a tournament format, those schools will not know who they will be playing until it is determined who won and lost the first round.

When asked by **SEN. WHEAT** if he felt this was fair, **Mr. Haugen** replied he believed so.

SEN. McGEE asked how MHSA is funded. **Mr. Haugen** replied funding prior to 1987 came from a portion of post-season tournament receipts. After 1987, they are funded by other associations in the country. Tournaments are now bid and all expenses are paid, and then all profits go back to the schools. Each activity now is funded by a $225 fee for each one of those activities. This is paid by the school board trustees. Since that format has been initiated, almost all schools receive those dues back. Larger schools receive more than what they paid in.

(Tape : 4; Side : A)

SEN. MANGAN asked **SEN. LAIBLE** to address lines 19-21 specifically and the concerns regarding the private accrediting agency, and to provide his opinion on how they are accredited now.

SEN. LAIBLE responded that lines 19 and 20 are clear and a nonpublic school means a school not accredited by the Board of Public Education. As far as what the accreditation standards are for the private schools, **SEN. LAIBLE** observed that if Bill Gates taught in one of these private schools without a teaching credential, he would not be allowed to teach computer sciences.

SEN. MANGAN referred the letter to Dan Makowski of Flathead Valley Christian School who responded they are accredited by the Association of Christian Schools International (ACSI). This organization has one million students world wide. The Northwest Association of Schools, Colleges, and Universities has a third-party agreement with ACSI, meaning dual certification is available on a reciprocal basis. In terms of standards and accreditation, MHSA is not an educational institution. They are an activities association and, in fact, all of the schools looking to be members would have to abide by their guidelines. Therefore, they are not being asked to change their standards.

SEN. MANGAN stated he is on the Education Committee and they have dealt with the accreditation issues in other bills. **SEN. MANGAN** asked to be supplied in the next couple of days with specific standards which Christian schools would fall under to perhaps narrow the language and eliminate unintended consequences.

SEN. PERRY asked **Mr. Beard** if there is a public swimming pool in Great Falls and whether students of non-public, non-accredited schools could swim there. **Mr. Beard** replied they could. When asked if the Country Club in Great Falls is private, **Mr. Beard** replied it was. **SEN. PERRY** asked if the Country Club could

refuse participation based on race, religion, affiliation, or a particular accreditation. **Mr. Beard** replied that he did not believe so.

SEN. BRENT CROMLEY told **Mr. Meloy** he is concerned with unintended consequences. **SEN. CROMLEY** asked if high schools belonged to other organizations which have jurisdiction over scholastic activities which have policies not allowing non-public schools to be members. **Mr. Meloy** responded he did not think so.

Kathy Bramer, Office of Public Instruction, informed the Committee that schools do belong to other organizations and associations, but she does not know whether they have rules that conflict with the statute.

CHAIRMAN GRIMES asked **Mr. Anderson** if MHSA has standards separate from the accreditation standards. **Mr. Anderson** replied the only requirement for admission to MHSA is that you be accredited by the state of Montana.

SEN. WHEAT stated to **Mr. Makowski** that he is struggling because he does not feel it is fair to allow the private schools to participate all year long and then be closed out of post-season tournaments. At the same time, **SEN. WHEAT** feels the language in the statute is too broad. Therefore, he is looking for help to narrow the language to help the students. The issue is about kids, not adults arguing about standards. **SEN. WHEAT** would like to see the kids participate in post-season events. **SEN. WHEAT** would like to support the bill, but cannot support it unless it can be narrowed.

Mr. Markowski stated there are nationally-recognized accrediting protocols. **Mr. Markwoski** suggested asking MHSA to define alternatives that are nationally-recognized that would permit separation between private schools and private oversight. **Mr. Markowski** feels that would put the issue back in the hands of MHSA.

SEN. WHEAT asked **Mr. Haugen** the same question and asked him to help narrow the bill. **Mr. Haugen** responded that he has worked on this over the years. **Mr. Haugen** stated he would work with the private schools to come up with a solution. The Northwest Association of Schools, Colleges, and Universities is the most likely organization to provide accreditation that would be amenable to all parties.

CHAIRMAN GRIMES asked **Mr. Fuller** about one opponent's comments regarding kids who were in the public school being placed in a

Christian School for the express purpose of playing sports, and how he would respond to that concern.

Mr. Fuller stated that is not the case. **Mr. Fuller** told of a youth who transferred to a Christian school, but he could not play basketball because he did not meet the grade point average. Private schools are not about picking up people who cannot cut it in the public system. **Mr. Fuller** feels the opposite is true, and people send children to private schools in an effort to raise the bar. Private schools see athletics as an extra-curricular activities, and a student's academics have to be acceptable in order to play.

SEN. McGEE understands we have a Board of Public Education that sets the accreditation standards; then OPI implements the accreditation standards; MHSA oversees the various activities, i.e., sports and music, and one of their conditions of participation is that the schools must meet the accreditation standards. **SEN. McGEE** asked where the Board of Public Education gets its accreditation standards.

Mr. Meloy responded the way the statute is written it says, upon coordination with and upon recommendation of the Superintendent of OPI, and the board sets those standards through a public rulemaking process.

SEN. McGEE repeated his understanding that the Board of Public Education has the authority to set the accreditation standards, but they go to OPI to get the information to set the accreditation standards, and then OPI is charged with the implementation of the standards they came up with to have the Board of Public Education put into rule.

Mr. Meloy agreed with this analysis saying it is the way the infrastructure is set up.

SEN. McGEE wanted to know where OPI comes up with the accreditation standards.

Mr. Meloy had to defer that question to the accreditation specialist from OPI.

Al McMilin, Accreditation Specialist with OPI, responded that it depends on the given area. For example, several years ago when the standards were put into place, they were developed by a joint effort of groups across the state. Many of the standards were derived from the national standards. The other place standards can be generated is from implementation of programs like "No Child Left Behind." **Mr. McMilin** believes that program will

require changes in rules. There are accepted practices in existence that contribute to the rules and standards.

SEN. McGEE asked if there were national entities that think about issues as they develop and then makes standards available.

Mr. McMilin stated there are organizations of accrediting bodies that collectively provide guidance in a variety of ways, as well as University Systems, etc.

SEN. MANGAN asked **Mr. Feaver** to explain the importance of having the certification standard and accreditation for teachers in our schools.

Mr. Feaver replied it is about standards, and a person who wishes to be a teacher goes through college to become a teacher. They take prescribed curriculum, they practice, they do student teaching and engage in the process of becoming teachers. Then they get certified by the state of Montana to recognize this process. They believe there is a science to teaching, and it is not simply an art.

SEN. MANGAN knows many people who go back to school to get a degree in another area. He asked if teachers have that same opportunity.

Mr. Meloy responded absolutely and teachers go back to school to continue their evolution toward better classroom practice. It is an obligation of the profession to continue to go back to school.

Closing by Sponsor:

SEN. LAIBLE referred back to the MHSA Handbook and read, "The Montana High School Association supports the concept of equal opportunity for the youth for the state of Montana." **SEN. LAIBLE** does not think MHSA is about accreditation since it is not an educational association. It is an association dedicated to athletics for Montana students. Where the kids go to school should not be an issue. The only question should be whether the kids want to play sports. When asked whether schools are asked to fill out a venue but not allowed to participate in the state-wide events, **Mr. Haugen** said something to the effect that they do not want to be exposed to these students. In response to **SEN. WHEAT's** question about waiver, there is no waiver available. **Mr. Feaver** testified, "It is about the standards." **SEN. LAIBLE** stated private schools are allowed to participate at the beck and call of the establishment. When they need someone to fill a schedule, their standards are high enough, but when those same schools want to participate in a state-wide tournament, then

their standards are not high enough. Personally, **SEN. LAIBLE** feels the standards are discriminatory. **SEN. LAIBLE** feels this is not about the accreditation standards, but it is about kids who want to participate in a sports program funded by tax dollars.

(Tape : 4; Side : B)

The question is, are we exclusionary of our Montana kids or are we inclusionary? **SEN. LAIBLE** urged the Committee to pass the bill for the kids.

EXECUTIVE ACTION ON SB 37

Discussion:

CHAIRMAN GRIMES recapitulated the last meeting and work that was done stating they have completed the license suspension issues. **CHAIRMAN GRIMES** provided a new worksheet to the Committee. **EXHIBIT(jus37a15)**. **SEN. MCGEE** and **SEN. PERRY** strongly recommended electronic monitoring in lieu of jail time with the exception of mandatory jail time. This lead to discussion about what was monitoring.

SEN. MANGAN pointed out, for conflict of interest purposes, that his company does electronic monitoring.

Mr. Mike Ferriter, Administrator, Community Corrections Division, introduced **Hank Whittaker** from the Fiscal Division. Presently, the Montana Department of Corrections does electronic monitoring specifically for what they call their intense supervision program. They have nearly 300 offenders on intensive supervision in seven communities in Montana, which certainly are not specific to DUIs. **Mr. Ferriter** stated no one, that he is aware of, is on their intensive supervision program for felony DUI. There is a DUI facility at Warm Springs. When those offenders leave Warm Springs, they go on to traditional supervision rather than electronic monitoring. They do some electronic monitoring above and beyond intensive supervision, but generally that is if an offender violates their conditions, and they are ordered as a sanction to go onto electronic monitoring. They are in the electronic monitoring business, but it is certainly not specific to DUIs.

SEN. McGEE stated we need to get tough on DUI offenders at the earlier stages. The Committee is wondering if some of the sanctions, instead of being jail or prison, could be electronic monitoring. **SEN. McGEE** asked if **Mr. Ferriter** knew if any of the

treatment facilities have the ability to track people electronically.

Mr. Ferriter replied Dave Armstrong, with Alternatives, Inc., in Billings, does quite a bit of electronic monitoring. They have a contract through the lower courts for misdemeanors. It is not difficult to find companies to provide this service.

CHAIRMAN GRIMES asked **Mr. Ferriter** to describe the different types of electronic monitoring available.

Mr. Ferriter explained there are two types of monitoring; passive and active. The passive system is what most people use. It sends out an electronic signal when an offender leaves a specific location. The active system, which is what was used initially, was a computer would call into the home to ensure an offender was there during the curfew period. They also wore a wristlet that worked like a lock and key, and used voice verification. Currently, they are trying new products from a company called BI. One is a voice verification program they are trying in rural Montana because they do not have the one-on-one contact. They are also trying a product where the offenders call into a computer to report. There are a variety of products and a lot of corporations in the market. They are satisfied with the products and there has never been a product issue. It is just a matter of catching up to the offender in time if they choose to leave.

CHAIRMAN GRIMES then asked if the authority they have is currently under the home arrest statute.

Mr. Ferriter replied that when they have an offender who violates their parole, they put them on house arrest instead of sending them back to prison. Intensive supervision is implemented under statute that authorizes the department to develop programs.

CHAIRMAN GRIMES asked if there was any concern why this could not be used at the local level for DUI repeat offenders and whether they currently have the authority to do that.

Mr. Ferriter replied he believes they do substitute county jail time for house arrest. One of the concerns with house arrest and one of the reasons it works is they have parole officers to support it. **Mr. Ferriter** feels you do need some human contact to make sure other things are taking place.

SEN. MANGAN added that local governments do have the authority to use house arrest and they have vendors available. It is just a matter of judges choosing to utilize that option.

CHAIRMAN GRIMES said **SEN. McGEE** and **SEN. PERRY** are recommending the titles pertinent to the jail time and fines would include the reference to electronic monitoring as an option specifically for DUIs. **CHAIRMAN GRIMES** suggested adding electronic monitoring devices to 61-8-734, **EXHIBIT(jus37a16).**

SEN. MANGAN commented that it has been his experience that judges and county attorneys like the jail option, but will occasionally use electronic monitoring. **SEN. MANGAN** feels more implicit language in the statute allowing for electronic monitoring would be fine, as long as judges and county attorneys have the discretion.

SEN. PERRY sees two issues with electronic monitoring: First, resistance to change. He feels use of electronic monitoring can be encouraged by including the language in 61-8-734. Secondly, if you do not encourage use of electronic monitoring, there will be a tendency to put people in jail. This will result in overcrowding in our jails which, in turn, highlights the need to build new jails.

CHAIRMAN GRIMES asked **Mr. Ferriter** about the electronic monitoring options and whether there is still the availability of confining an individual to a location and allowing for schedule changes for work.

Mr. Ferriter replied that with their contract with BI, if an offender needs to change their schedule, there is an ability to call in and get the schedule changed, but Parole officers have to authorize the change. This happens frequently and that is why you need human contact in addition to the electronic monitoring device.

SEN. WHEAT reviewed the proposed change for first and second offense DUIs where it said jail time and/or electronic monitoring "if treatment." **SEN. WHEAT** asked about the DUI facility at Warm Springs; who it was for and how many beds were available.

Mr. Ferriter explained the facility was for fourth time felony DUI offenders and the facility has 140 beds. It is a six-month program and there are about 280 felony DUI offenders a year. At the moment, they feel they are able to handle the offenders. The majority of felony DUI offenders go to the program; however, some go to prison for other offenses.

SEN. WHEAT asked if the felony DUI offenders come to the program via Montana State Prison.

Mr. Ferriter stated offenders are sentenced by court order committing them to the Montana Department of Corrections. At that point, the department has discretion for the next 13 months. If they go to treatment, a portion of that 13 months can be suspended. Therefore, if a person goes to treatment for six months, the remaining seven months is suspended.

SEN. WHEAT asked if the treatment is working.

Mr. Ferriter replied early studies indicate it is working, but the program has only been open for a year. Approximately 90 percent of the people completing the program are still in the communities and are complying. However, the recidivism definition does not kick in for three years, but so far they are satisfied.

When **SEN. WHEAT** asked if it is a new facility at Warm Springs, **Mr. Ferriter** explained it is the old Forensic Unit from the State Hospital. It is a modern facility with good security measures.

Upon question, **Mr. Ferriter** estimated maximum capacity would be approximately 180 and maybe more if all of the rooms were double-bunked.

SEN. WHEAT inquired what the per person cost is to go through the program.

Mr. Ferriter replied they have a contract with Community Counseling and Correctional Services and they pay them $50.16 per day per offender. The state does own the building.

SEN. WHEAT explained that if treatment is a viable option and is working for people who have a fourth offense DUI, it should work for those with first or second offenses. However, we need some place to treat these people, especially those who cannot afford treatment. **SEN. WHEAT** asked if the facility went to full capacity, whether it could accommodate first-, second-, or third-time offenders.

Mr. Ferriter depicted the facility as consisting of four individual pods. He could envision three of the four pods being utilized by felony offenders, and one pod used for misdemeanor offenders. **Mr. Ferriter** is not sure the two populations, felony and misdemeanor, should be mixed.

SEN. WHEAT stated it might make sense for first offenders to see felony offenders, and **Mr. Ferriter** agreed.

CHAIRMAN GRIMES was not sure he has a good handle on the treatment for first, second, and third offense felonies.

Mr. Ferriter indicated for the felony DUI it is a six-month, eight and one-half hour a day treatment program called a therapeutic community. Each pod is called a family, and it is based on the concept that the actions within the facility affect the other members within that pod, just like a felony DUI offender affects his/her community and family. **Mr. Ferriter** understands this is as intensive as any other state in the country for DUI offenders.

CHAIRMAN GRIMES related his understanding that if someone gets a felony DUI they get 13 months they are supposed to spend in jail. That can be waived if they go to treatment for six months. **Mr. Ferriter** stated **CHAIRMAN GRIMES'** understanding is correct.

SEN. McGEE contacted **Dave Armstrong** at Alternatives in Billings, and **Mr. Armstrong** relayed these thoughts: First of all, they have a contract with local law enforcement, so they can act like a detention facility for the first days of a sentence. Second, the fees for detention or for electronic monitoring are paid for by the offender. Third, they have a lot of electronic monitoring going on right now, some of which are DUIs. There is a funding issue because when these people do not pay their bills, Alternative is left holding the bag. **SEN. McGEE** suggested under fines and jail time, for the first, second, and third DUIs, adding in jail "or local detention and/or monitoring." The goal would be to make another kind of detention available to the court.

Ms. Lane brought to the Committee's attention 61-8-734, which could be amended to include local detention and/or monitoring. **CHAIRMAN GRIMES** stated the Committee's intention is to include local detention and/or monitoring.

CHAIRMAN GRIMES noted that under fines and jail time, one of the bills had a 90-day treatment for third offense jail time. **CHAIRMAN GRIMES** thought that should be stricken.

SEN. O'NEIL is curious as to how the price of electronic monitoring compares to the price of treatment. If a person has a problem with the monitoring and treatment keeps them free of drugs and alcohol for 90 days, that would be beneficial.

SEN. McGEE stated **Mr. Armstrong** told him the cost for electronic monitoring is on the order of $10 per day. There is a six-month program at Warm Springs, but **SEN. McGEE** is not aware of any 90-day programs. Regarding treatment, either the person comes in

with the attitude that they need the treatment, or they have to learn that somewhere along the line, or it will fail. You cannot force treatment on people. As a Legislature, we have to look at it from the punitive perspective. We can let them choose treatment as an alternative, but **SEN. McGEE** believes the vast majority of people who are drinking and driving do not believe they have a problem. Therefore, if you send them to treatment, they may endure it, but treatment itself will not be effective.

CHAIRMAN GRIMES stated they will get rid of the 90-day treatment and asked Ms. Lane to look at whether local detention or monitoring is in the statute and then the Committee will decide if they want to strengthen it.

The Committee then discussed the Refusal to Blow section of Exhibit 15. **CHAIRMAN GRIMES** explained that what originally happened was the per se offense was implemented 20 years ago which was significantly less onerous in jail time and fines. Now that the per se has been made tougher, there is very little difference between the per se and DUI charge. This has been a contributing factor to what **REP. BRAD NEWMAN** was speaking about with regard to 40 or 50 percent not being willing to take a breathalizer. **CHAIRMAN GRIMES** feels if the Committee leaves per se alone, with an increase in fines or jail time, the Committee would be going in the right direction. Therefore, he does not believe the per se statutes need any adjustment.

Ms. Brenda Nordland, Department of Justice, informed the Committee there were changes and referred the Committee to HB 195, the repeat offender bill requested by the Department of Transportation in order to meet the federal mandates. There were changes in terms of the length of incarceration at both the second and third offense levels. Because the federal government requires a standard of five days for the second offense and ten days for the third offense, the floor will be the same for both second and third per se DUIs, and second and third blood alcohol content (BAC) DUIs.

CHAIRMAN GRIMES did not reflect that in Exhibit 15. **Ms. Nordland** then stated the only way around this would be to choose not to comply with the federal mandate. To comply with the federal mandate, the two have to be treated the same.

CHAIRMAN GRIMES then wanted to know if there would be anything left in the per se to even keep it on the books. There is no longer an incentive, except for maybe on the first offense, if the penalties and fines are the same.

SEN. O'NEIL asked if the five- and ten-day incarceration could be satisfied with house detention and electronic monitoring.

Tim Reardon, Department of Transportation, stated the federal rule provides house arrest with electronic monitoring as an acceptable alternative to the five-day minimum for the second offense, as well as to the seven-day minimum for the third offense.

CHAIRMAN GRIMES stated there are feelings among county prosecutors that since it is a privilege to drive on Montana roadways, there is an implied consent that they will consent to a breathalizer. Legislative Services staff feel this would be a constitutional violation because of self-incrimination and other issues. **CHAIRMAN GRIMES** asked **Mr. Reardon** for his opinion on the issue and how he would suggest turning around the 40 and 50 percent refusal rate.

Mr. Reardon stated he does not have the background to address this issue, but whenever you start to talk about potentially unconstitutional activities, it needs to be researched. **Mr. Reardon** is not familiar with implied consent in other states.

CHAIRMAN GRIMES informed the Committee the argument is if you draw blood, that can be demonstrated to be search and seizure. In addition, there is a right to not self-incriminate. Therefore, we cannot mandate a breathalizer. There is no longer an incentive to go with the per se, so it might as well be left on the books. **CHAIRMAN GRIMES** feels this is an issue which needs to be corrected at some point in time. Because of the self-incrimination and search and seizure issue, jail time or sentences cannot be increased with regard to refusal to blow. However, you can suspend a license for refusal to blow. About the only thing they can do is increase the suspension on the driver's license if they refuse to blow. **CHAIRMAN GRIMES** also suggested making the interlocks mandatory for a longer period of time. **CHAIRMAN GRIMES** found it frustrating to be so limited in sanctions when someone refuses to blow.

SEN. O'NEIL feels the Committee should be careful and should leave a first time per se violation with less sanctions than a DUI violation. **SEN. O'NEIL** is concerned about creating additional prosecution expenses.

CHAIRMAN GRIMES suggested leaving the per se statute alone. **Ms. Nordland** reminded **CHAIRMAN GRIMES** that they needed to be in compliance with the federal mandate to keep funds from diverting. This would apply to repeat offenders, but does also apply to the per se statute.

CHAIRMAN GRIMES summarized stating first offense DUI will have a suspended license for six months, with the possibility of a probationary license. If the BAC is over .16, an interlock devise will be mandatory. If BAC is under .16, an interlock devise will be permissive.

If a person chooses not to blow, there is no probationary license. If a person does not get a second DUI within five years, their record can be expunged. This will provide an incentive for people to blow. **CHAIRMAN GRIMES** thought it would be a good idea if the record expungement provision would only apply to per se violations.

Ms. Nordland could not come up with a reason not to differentiate between per se violations and DUIs with the provision of record expungement.

SEN. CROMLEY thought having the expungement provision in the DUI first offense would also be an incentive to blow.

Ms. Lane stated that in per se, you have to have some sort of test to show alcohol concentration. If the person refuses to blow and are not forced to undergo a blood test, there is no BAC to use for a per se.

SEN. CROMLEY suspects that in practice, per se is not used that much.

CHAIRMAN GRIMES stated they would try to include record expungement in both DUI and per se offenses.

CHAIRMAN GRIMES then stated an interlock mandatory for one year after the probationary licence. If a person refuses to blow, then there is interlock for a whole year thereafter. **CHAIRMAN GRIMES** questions the constitutionality of this provision.

Ms. Lane's understanding is that **REP. NEWMAN** has a bill that would criminalize a refusal to blow. This bill has constitutional problems.

CHAIRMAN GRIMES asked **SEN. MANGAN** whether he feels there should be a distinction and the interlock should be used as a tool.

SEN. MANGAN replied he is in the same boat with **REP. NEWMAN.** He knows there are constitutional issues and this is a decision that will need to be determined this session or through the courts. There are people driving around with suspended licenses, but that is considered a motor vehicle violation, and there is not much you can do criminally. These same issues exist with refusal to

blow. **SEN. MANGAN** likes the idea, but is not sure how far the bill will get.

SEN. CROMLEY does not feel there are constitutional concerns because it is a privilege to drive.

The next issue before the Committee was registration revocation. This is under **SEN. WHEAT's** bill SB 318 and was not related to refusal to blow, but had to do with a second or third DUI. **CHAIRMAN GRIMES** said this is a new concept and decided it should be kept it.

SEN. McGEE stated if they were to make registration revocation for two years on the second or third DUI, but allow the person to have a license after one year. **SEN. McGEE** believes the registration revocation should be commensurate with the driver's license revocation.

SEN. PERRY feels if you revoke a license it affects one individual. If you cannot register a vehicle, it affects everyone in the family who might drive that vehicle. **SEN. PERRY** feels this is stretching it a bit far.

SEN. CROMLEY stated if a person is not able to drive, he does not see the purpose in canceling the registration.

CHAIRMAN GRIMES decided to leave the registration revocation out for both per se and DUI and suggested **SEN. WHEAT** will have to make that pitch in executive action.

SEN. O'NEIL understands if jail time is more than one year, it is a felony. He wondered if it also turns into a felony if a person is on house arrest for more than one year, or their license is suspended for more than one year.

Ms. Lane explained that the criminal laws are written in such a way that they define the offense and state what the penalty is for. Then a person is charged with the violation of a particular statute. It is not the sentence that makes the determination, it is the charge.

SEN. PERRY commented about the use of community service and wonders if it is a deterrent. Most people feel it is a joke. People choose community service as an option because it is no deterrent, no punishment, and is not a big deal.

(Tape : 5; Side : B)

SEN. CROMLEY stated community service is an alternative for the judge to use in addition to other penalties, rather than in lieu of other penalties.

SEN. PERRY'S second point has to do with fines. Some fines are of no consequence whatsoever, and others people cannot afford. **SEN. PERRY** pointed out that for the second offense, the upper-end of the fine remained the same. **SEN. PERRY** feels $1,000 for some people is nothing. He recommended boosting that fine to $2,500 stating if the fine does not hurt, it will not be effective. **SEN. PERRY** thought the fines for third and fourth offense are all right.

Mr. Ferriter stated that in felony DUIs, the offender is taken out of employment for six months and judges use the implementation of interlock devices. Judges are reluctant to go to the $10,000 fine because offenders are hard-pressed financially.

CHAIRMAN GRIMES also wanted to address the concept of confiscation in SB 213 of **SEN. BILL GLASER. CHAIRMAN GRIMES** asked if the Committee was interested in considering this concept.

SEN. O'NEIL asked if the fine level can determine if a person committed a felony.

Ms. Lane believes a felony only depends on the jail time that can be given by definition in the criminal procedures code.

SEN. PERRY is against the concept of confiscation and feels it does not make sense.

CHAIRMAN GRIMES asked Valencia to work on the Committee's suggestions.

ADJOURNMENT

Adjournment: 1:00 P.M.

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SEN. DUANE GRIMES, Chairman

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CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus37aad)