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Case Number: DA 26-0179

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 26-0179

MONTANA QUALITY EDUCATION COALITION; DISABILITY RIGHTS MONTANA,

Plaintiffs, Appellees and Cross-Appellants,

v.

STATE OF MONTANA, GREG GIANFORTE, in his official capacity as GOVERNOR OF THE STATE OF MONTANA; and SUSAN HEDALEN, in her official capacity as SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants, Appellants and Cross-Appellees,

and

SUE VINTON, in her official capacity as member of the Montana House of Representatives and Sponsor or HB 393,

Intervenor-Defendant, Appellant and Cross-Appellee.

APPELLANTS STATE OF MONTANA, GREG GIANFORTE, and SUSAN HEDALEN'S OPENING BRIEF

On Appeal from the Montana First Judicial District Court
Lewis and Clark County Cause No. ADV-2024-44
The Honorable Mike Menahan, Presiding

(Appearances on following page.)

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Table of Contents

TABLE OF AUTHORITIES

Cases

Other Authorities

Statement of the Issues

1. Whether the district court erred in not finding HB 393's education savings accounts to be a private purpose trust fund under Montana Code Annotated § 17-2-102(3), which had a proper appropriation for the trust from the public-school funding formula as a bond, note, or other obligation under the permanent appropriation statute, Montana Code Annotated § 17-7-502?

Statement of the Case

Plaintiffs/Appellees/Cross-Appellants Montana Quality Education Coalition and Disability Rights Montana challenged Montana House Bill 393 (2025) ("HB 393"), which established education savings accounts ("ESAs") for special needs students in Montana. Appellees alleged that HB 393 violated Montana Constitution Article V, § 11(5) (appropriations to private institutions or individuals), Article X, § 1(1) (equality of educational opportunity), Article VIII, § 14 (appropriation for money from treasury), and Article X, § 8 (supervision and control of school district schools by board of trustees). Appellees sought declaratory and injunctive relief against HB 393. (Doc. 1.) Sue Vinton, in her official capacity as a member of the Montana House of Representatives and

Sponsor of HB 393 (now a member of the Montana Senate), was granted intervention. (Doc. 16.)

Plaintiffs first moved for a preliminary injunction of HB 393. (Docs. 8–9.) The district court denied the motion. (Doc. 33.) Intervenor-Defendant Sue Vinton moved for summary judgment on all claims in the case. (Docs. 62–63.) Plaintiffs cross-moved for summary judgment on their claims under Counts I (appropriations to private institutions or individuals), III (appropriation for money from treasury), and IV (supervision and control of school district schools by board of trustees) (Docs. 64–65.) Defendants filed a combined response in opposition to Plaintiffs' motion for summary judgment and brief in support of Intervenor-Defendant's motion for summary judgment. (Doc. 74.)

The district court granted Plaintiffs' motion for summary judgment as to Count III, holding that "HB 393 violates Article VIII, Section 14 because it does not meet the statutory requirements set forth in Montana Code Annotated § 17-7-502" and "[i]t is not an appropriation 'made by law.'" (Doc. 86 at 21.) The district court rejected Vinton's argument that ESA funds are "bonds, notes or other obligations" in coming to this conclusion. (Doc. 86 at 15.) The district court found that Count I of the complaint was moot. (Doc. 86 at 21.) Finally, the district court denied Plaintiffs' motion on Count IV because "[a]ny statutory conflict between existing law and HB 393 is resolved by general rules of statutory construction" so "HB 393 does not violate Article X, Section 8 of the Montana Constitution." (Doc. 86 at 22.) The district court denied Intervenor-Defendant Sue Vinton's motion for summary judgment because it found "[t]here are genuine issues of material fact which preclude summary judgement on Count II." (Doc. 86 at 22.)

All parties filed a joint motion for a partial stay of the district court's order enjoining HB 393 to authorize the Office of Public Instruction (OPI) to reimburse 43 families for payments already made by the families for their special needs students and already approved for reimbursement by OPI from October 25, 2025 through November 25, 2025, from the families' existing ESA balances. (Doc. 89.) The district court granted the motion. (Doc. 90.)

Defendants then moved for a stay of the district court's order, which was issued mid-school year in December 2025, pending determination of attorneys' fees and costs and appeal to allow the 64 special needs students and their families to continue using their ESAs for the duration of the school year and to allow the families until June 30, 2025, to submit a request for reimbursement. (Doc. 91.) The district court granted the motion and stayed its judgment until the conclusion of the appeal. (Doc. 92.) Plaintiffs moved to vacate the stay. (Doc. 93.) Defendants opposed. (Docs. 102–104.) The district court denied Plaintiffs' motion to vacate, withdrew its order granting stay of judgment pending attorney's fees determination and appeal (Doc. 92), and granted Defendants' motion for stay of judgment pending attorney's fees determination and appeal, staying its judgment until the conclusion of the current school fiscal year. (Doc. 117.)

Plaintiffs filed a bill of costs. (Doc. 95.) Defendants objected. (Doc. 98.) The district court granted Plaintiffs' bill of costs in part. (Doc. 111.) Plaintiffs moved for attorney fees. (Docs. 99–100.) Defendants opposed. (Doc. 102.) The district court denied Plaintiffs' motion for attorney fees. (Doc. 118.)

Defendants timely appealed the district court's summary judgment order and final judgment. (Doc. 124.) Plaintiffs filed a notice of cross-appeal, cross-appealing the order denying attorney fees, the summary judgment order, and the final judgment. (Doc. 127.)

Statement of the Facts

Appellants hereby adopt and incorporate by reference the Statement of Undisputed Material Facts in Intervenor-Defendant Sue Vinton's Brief in Support of Motion for Summary Judgment. (Doc. 63 at 2–14.)

HB 393 establishes education savings accounts for eligible special needs Montana students. HB 393 (2023), **attached as App'x A,** § 2. It notes that the

> special needs equal opportunity education savings account program [is] provided by the legislature as a desirable educational program pursuant to Article X, section 1(3) of the Montana constitution, which gives authority to the legislature to provide for educational programs and institutions in addition to a basic system of public schools that will fulfill the goal of the people to have an overall system of education that offers equal opportunity for all to reach their full educational potential.

HB 393, § 2(1). The law enumerates which educational expenses the superintendent can approve for reimbursement from the education savings accounts. HB 393, § 4. Then it outlines the contract required between the superintendent and the parents of qualified students who wish to participate in the ESA program. HB 393, § 5.

Section 9 provides for funding and administration of the education savings accounts. As a public educational program contemplated in Article X, section 1(3) of the Montana Constitution, the ESA program gets its funding from the existing appropriation for the public-school funding formula, where, much like an interdistrict transfer, the funding follows the student who utilizes the public special needs ESAs instead of the public school. HB 393, section 9 provides:

> (1) Following receipt of a signed contract pursuant to [section 5], the superintendent of public instruction shall notify the resident school district of the qualifying student's participation in the program and the amount calculated by dividing the student's ESA student amount by 10.
>
> (2) Beginning with the next distribution of BASE aid payments pursuant to 20-9-344 for the months of August through May, the resident school district shall remit to the office of public instruction the amount calculated in subsection (1) for each participating student by no later than the 10th of the month following the BASE aid distribution.
>
> (3) The money remitted under subsection (2)
>
> (a) must be from the district's general fund;
>
> (b) may not include revenue from the guarantee account described in 20-9-622; and

(c) must be accounted for under rules adopted by the superintendent of public instruction.

(4) The superintendent of public instruction shall account for the money remitted under subsection (2) as follows:

(a) 95% of the money must be deposited in accounts within the special needs equal opportunity education savings trust established in [section 10] to be used only for reimbursing parents for the purchase of allowable educational resources pursuant to [section 4]; and

(b) 5% of the money must be deposited in the office of public instruction special needs equal opportunity ESA administration account established in subsection (7).

(5) The office of public instruction shall ensure that the participating student is included in the resident school district's ANB calculation pursuant to 20-9-311 in any year that the student remains otherwise eligible for inclusion and participates in the program. No other school district may count the student for ANB purposes. The participating student is not considered to be enrolled in the resident school district.

(6) The office of public instruction shall administer the individual student accounts pursuant to subsection (4)(a) so that:

(a) reimbursements are made promptly to parents for the purchase of allowable educational resources for a participating student pursuant to [section 4]; and

(b) on a student's 24th birthday, the student's account is closed and any remaining funds in the student's account are returned to the guarantee account described in 20-9-622.

(7) (a) There is an office of public instruction special needs equal opportunity ESA administration account within the state special revenue fund created in 17-2-

102 consisting of 5% of the money remitted to the office of public instruction pursuant to subsection (2).

(b) Funds in the office of public instruction special needs equal opportunity ESA administration account are statutorily appropriated, as provided in 17-7-502, to the office of public instruction and must be used for the costs of administering the program.

STANDARD OF REVIEW

The Montana Supreme Court reviews a district court's grant of summary judgment de novo. *McClue v. Safeco Ins.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604 (internal citations omitted). Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). Under de novo review, this Court must determine whether (1) the district court's conclusions of law are correct and (2) its findings of fact are not clearly erroneous. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839 (internal citations omitted).

The party presenting a facial challenge must prove that "no set of circumstances exists under which the [challenged sections] would be valid." *Mont. Cannabis Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (internal citations and quotations omitted); *see also*

Advocates for Sch. Tr. Lands v. State, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825 (stating if any constitutional application is shown, the facial challenge fails).

The Montana Supreme Court's "review of constitutional questions is plenary." *Williams v. Bd. of Cnty. Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88 (internal citations omitted). "The party challenging the constitutionality of a statute bears the burden of proving that it is unconstitutional 'beyond a reasonable doubt' and, if any doubt exists, it must be resolved in favor of the statute." *Hernandez v. Bd. of Cnty. Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638 (quoting *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877).

"Statutes are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible." *Hernandez*, ¶ 15. "The constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Powder River Cnty. v. State*, 2002 MT 259, ¶¶ 73–74, 312 Mont. 198, 60 P.3d 357.

Summary of the Argument

The education savings account (ESA) program created by HB 393 is a private purpose trust fund that is funded under the public-school funding formula and recognized under the permanent appropriation statute, Montana Code Annotated § 17-7-502. The costs of administration of the ESA program have a separate appropriation as they comprise a state special revenue fund.

The district court's conclusion that there was no proper statutory appropriation for the ESA program incorrectly rejects the applicability of the framework of Montana Code Annotated § 17-7-502. This statute provides for appropriations for agencies such as OPI to pay "bonds, notes, or other obligations" such as the ESA trust under HB 393. And indeed, HB 393 expressly amended Montana Code Annotated § 17-7-502 to reflect the administrative cost appropriation. HB 393 reprinted § 17-7-502(4) in Section 11, acknowledging the applicability of the bonds, notes, or other obligations appropriation framework to OPI's obligation to fund the ESA trust. The Legislature's intent and act of providing an appropriation for the ESA trust is clear in HB 393.

HB 393 transparently lays out how, just as in an interdistrict transfer situation, funding from the public-school funding formula follows the student as that student elects to leave a traditional public school and instead participate in HB 393's public educational program of special needs ESAs.

HB 393's fiscal note explicitly acknowledged the appropriation structure: 95% of the money to be deposited in a private purpose trust-fund to be used for participating students and 5% to be deposited in the Special Needs Education state special revenue account for costs of administration of HB 393.

HB 393 properly appropriated the full cost of funding the ESA program by (1) acknowledging the permanent appropriation statute authorizing agency payment of bonds, notes, or other obligations such as the funding of the ESA program, and (2) creating a state special revenue account and corresponding appropriation for costs of administration.

It was error for the district court not to recognize HB 393 as a private purpose trust fund with a proper appropriation under Montana Code Annotated § 17-7-502.

Argument

I. HB 393's Education Savings Accounts are a private purpose trust fund that had a proper appropriation.

HB 393 provides proper appropriations both for the 5% administrative costs, a state special revenue fund, and the 95% trust costs, a private purpose trust fund. The fiscal note assumes 100 eligible students would utilize the education savings accounts and estimates the fiscal impact accordingly. *See* HB 393 Fiscal Note, **attached as App'x B,** ¶ 9. The fiscal note also outlines the amount of funding anticipated to be received from school districts to OPI for program participation of 100 students. HB 393 Fiscal Note, ¶ 12. It notes the private purpose trust funds would receive 95% and the special needs education savings account would receive 5%. *Id.* As noted in the Statement of the Facts, HB 393, section 9 sets forth the funding mechanism—a function of the Montana public-school funding formula—in detail. It also notes the statutory appropriation for the 5% administrative costs. And Section 11 expressly adds Section 9 to Montana Code Annotated § 17-7-502, the permanent appropriation statute, then also reprints Section 4 of § 17-7-502 that allows OPI to pay "all bonds, notes, or other obligations[.]"

The district court notes that the parties do not dispute the valid appropriation for the administrative costs of the program. (Doc. 86 at 11, n.3, *see* HB 393, § 9(7).) The district court took issue with the fact that HB 393 outlines a 5% appropriation for the education savings accounts' administrative expenses but, according to the district court, was missing an appropriation for the other 95% of expenses associated with the education savings accounts. (Doc. 86 at 15.) Not so.

Governmental fund structure is set forth in Montana Code Annotated § 17-2-102. The state treasury consists of four different fund categories: (1) the governmental fund, (2) the proprietary fund, (3) the fiduciary fund, and (4) the higher education funds. Mont. Code Ann. § 17-2-102.

The fiduciary fund category includes trust and custodial fund types used to account for assets held by state government in a trustee capacity or as an agent to individuals, private organizations, other governmental entities, or other funds. These include:

(a) Private purpose trust fund type;
(b) Investment trust fund type;
(c) Pension and other employee benefit trust fund type; and
(d) Custodial fund type.

Mont. Code Ann. § 17-2-102(3).

The administrative expenses associated with the education savings accounts constitute a state special revenue fund. State special revenue funds need an appropriation.

> The state special revenue fund consists of money and other proceeds from state and other nonfederal sources deposited in the state treasury that is earmarked for the purposes of defraying particular costs of an agency, program, or function of state government and money and other proceeds from other nonstate or nonfederal sources that is restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation.

Mont. Code Ann. § 17-2-102(1)(b)(i).

HB 393 properly created an appropriation for the administrative costs of the education savings accounts—a special revenue fund. HB 393, § 9(7).

The education savings accounts themselves constitute a private purpose trust—a fiduciary fund as noted in Mont. Code Ann. § 17-2-102(3)(a). HB 393 does have an appropriation for the ESA trust. HB 393's fiscal note explains the appropriation structure of the law:

> Section 9 of HB 393 requires 95% of the money to be deposited in a private purpose trust-fund to be used for participating students and 5% of the money to be deposited in the Special Needs Education Savings state special revenue account established in the bill for the Office of Public Instruction (OPI) administration of the program.

HB 393 Fiscal Note, ¶ 10.

Intervenor-Defendant Representative (now Senator) Sue Vinton further explained this framework in identifying Montana Code Annotated § 17-7-502. (Doc. 63 at 23–24.) This statutory section is a permanent appropriation statute, including a mechanism whereby agencies can allocate funds for payment of specific, listed obligations as they come due. HB 393 added the appropriation for the administrative costs of the ESA program to the permanent appropriation statute. HB 393, §§ 9(7)(b). Section 11 of HB 393 also reprints subsection (4) of Montana Code Annotated § 17-7-502, providing the mechanism for agencies to pay bonds, notes, or other obligations:

> (4) There is a statutory appropriation to pay the principal, interest, premiums, and any costs or fees associated with issuing, paying, securing, redeeming, or defeasing all bonds, notes, or other obligations, as due in the ordinary course or when earlier called for redemption for defeased, that have been authorized and issued pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory appropriation authority for the payments.

Mont. Code Ann. § 17-7-502(4), HB 393, § 11(4). HB 393, Section 11 amends § 17-7-502 to reference the 5% costs of administration from Section 9 of HB 393—in § 17-7-502(3)—and reprints § 17-7-502's mechanism for agency payment of bonds, notes, or other obligations for the cost of the ESA trust—§ 17-7-502(4). The ESA trust is an example of "bonds, notes, or other obligations" authorized and appropriated under Mont. Code Ann § 17-7-502.

A discussion of Montana's public-school funding formula is instructive. Montana's public education funding formula funds *students*, not schools. The Legislature's intent is for students to receive funding for their guaranteed public education. That's why most of the funding formula—the average number belonging, or ANB—follows the student, rather than the school. *See* Montana Office of Public Instruction, School Finance Division, *Understanding Montana School Finance And School District Budgets* (December 2024), **attached as App'x C,** at 10–20; (*see also* Doc. 63, Statement of Undisputed Material Facts, ¶¶ 51–53). When a student enrolls in HB 393's ESA Program, the student's state-assigned residential boundary school redirects part of the per-student money from the public-school funding formula to the ESA Program. (Doc. 63, Statement of Undisputed Material Facts, ¶ 50.) And that makes sense—Article X, section 1(3) of the Montana Constitution states, among other things: "The legislature shall provide a basic system of free quality public elementary and secondary schools." It does not state that the legislature shall provide fixed funding to each traditional public school regardless of number of students enrolled in that school. Article X, section 1(3) goes on to state: "The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable." HB 393's ESA Program is clearly such an "educational program as [the Legislature] deems desirable."

The appropriation for HB 393 is ultimately found in the appropriation for public-school funding in Montana, contained in the state's biennial appropriations bill. (*See* Doc. 63, Statement of Undisputed Material Facts, ¶ 55.) And HB 393 makes an additional appropriation for administrative costs of the ESA Program. HB 393, § 12. "A long line of Montana cases has established that 'appropriation' refers only to the authority given to the legislature to expend money from the state treasury." *Nicholson v. Cooney*, 265 Mont. 406, 415, 877 P.2d 486, 491 (1994). "Appropriation" means an authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the state. *Id.* As a public educational program deemed desirable and created by the Legislature, HB 393's ESA Program properly draws upon the existing appropriation for public education. HB 393, § 2(1). And the funding formula directs a portion of the funds to follow the student, just as it would in the case of interdistrict transfer. *See* Mont. Code Ann. §§ 20-5-323(1); 20-5-324(4)(a)(i) (the student's boundary district calculates a per-student amount based on local "property tax levies" and pays that revenue from "the district's general fund" (or any other legally available local fund) to a different school district the student attends). So, for example, when a student transfers school districts, the old district loses funding and the new district receives more funding—because the funding follows the student. Here, an ESA participant moves out of a school district and into this new educational program. Like the transfer student, the funding follows the ESA student to this new educational program.

There is no constitutional right that public schools can assert to a guaranteed amount of funding per year. Rather, it is the *students* who have the right to a free and quality public education. It is no accident that a large part of the public-school funding formula derives from the number of students in a particular school district. Also, Appellees/Cross-

Appellants or public schools suffer no harm when funding follows students who choose to utilize the ESA Program. They don't have a right to those funds in the first place. And any funds redirected from local school districts to ESA students are *de minimis*—only 47 students were enrolled in Montana's ESA Program at the outset. (*See* Doc. 63, Statement of Undisputed Material Facts, ¶¶ 28–32, 38.) That number has not increased much. Moreover, the taxpayers are always funding their local schools regardless of whether they have children, let alone children in the public schools in that district. So even if parents withdraw their children to an ESA program, the school district still receives taxpayer funds from those parents.

The ESA program is a private purpose trust fund recognized under Montana law and funded by a permanent appropriation under the public-school funding formula and Mont. Code Ann. § 17-7-502, which HB 393 explicitly amended to include the 5% cost of administration appropriation from Section 9. Section 11 of HB 393 also reprinted § 17-7-502(4), the mechanism permitting OPI to pay bonds, notes, and other obligations such as the funding of the ESA trust. The district court erred in rejecting the premise that the ESA trust is a bond, note, or other obligation.

Conclusion

The district court erred in failing to recognize HB 393 as a private purpose trust fund with a proper appropriation under Montana Code Annotated § 17-7-502. All costs associated with HB 393's ESA program are covered by appropriations: for the ESA trust under the public-school funding formula utilizing the permanent statutory appropriation framework that allows OPI to pay "bonds, notes or other obligations," and for the state special revenue fund a separate express 5% appropriation for costs of administration. Permitting the district court's conclusion to stand will upend the Legislature's ability to utilize the permanent statutory appropriation framework when appropriate. The ESA trust is an obligation for which OPI is responsible and such obligation was acknowledged in the statute with the inclusion of Mont. Code Ann. § 17-7-502. The district court's holding is incorrect as a matter of law. This Court should reverse the district court.

DATED this 17th day of June 2026.

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Certificate of Compliance

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,001 words, excluding certificate of service and certificate of compliance.

/s/ Thane Johnson
Thane Johnson

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APPENDIX

CERTIFICATE OF SERVICE

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