

Rylee Sommers-Flanagan
Christopher Patalano
Constance Van Kley
Upper Seven Law
P.O. Box 31
Helena, MT 59624
(406) 396-3373
rylee@uppersevenlaw.com
christopher@uppersevenlaw.com
constance@uppersevenlaw.com

Attorneys for Plaintiffs

Tal M. Goldin
Michelle L. Weltman
Disability Rights Montana
1022 Chestnut Street
Helena, MT 59601
(406) 449-2344
tal@disabilityrightsmt.org
michelle@disabilityrightsmt.org

Attorneys for Disability Rights Montana

**MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY**

The MONTANA QUALITY
EDUCATION COALITION;
DISABILITY RIGHTS MONTANA,

Plaintiffs,

vs.

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

Defendants.

Cause No. BDV-25-2024-0000044-IJ

Complaint

Presiding Judge: Hon. Michael McMahon

INTRODUCTION

1. In 2023, the Montana Legislature passed House Bill 393 (“HB 393”) to shake out Montanans’ public education piggy bank, authorizing private citizens to spend public school money on everything from private school transportation to SAT prep to college tuition. The bill sets up education savings accounts (“ESAs”) for parents of students with disabilities (“qualified students”) and begins by offering between \$5,390 and \$8,419 annually as an incentive for qualified students to leave or refrain from ever enrolling in public schools. ESAs will pull state funding directly from local public school accounts and inflate general fund budgets, leading to increased local property taxes.
2. While HB 393 provides no assurance that students with disabilities will receive the services and education they need, it assuredly provides that public schools will have fewer resources to serve their students, with and without disabilities.
3. HB 393 violates the Montana Constitution in four ways. First, by directing public funds to private actors, it violates Article V, Section 11(5), which prohibits appropriations “for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.” Second, in failing to specify the cost and recipients of payments, it violates Article VIII, Section 14, which bars paying money “out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.” Third, for the same reason, it violates Article V, Section 1’s nondelegation principle. Fourth and

finally, by directing cash payments to some students to the direct disadvantage of others, it violates Article X's unequivocal guarantee of "equality of educational opportunity" to all Montana students. Mont. Const. art. X, § 1(1).

4. HB 393 is part and parcel of a recent national effort to privatize education with public funds that cannot be squared with the spirit and letter of the Montana Constitution. Indeed, the Montana legislature is obligated to "provide a basic system of free quality public elementary and secondary schools" and to "fund and distribute in an equitable manner to the school districts the state's share of the cost" of those schools. Mont. Const. art. X, § 1(3).
5. Plaintiffs Disability Rights Montana ("DRM") and Montana Quality Education Coalition ("MQEC") challenge HB 393 to prevent already limited public school funds from being diverted to private individuals and institutions. Plaintiffs are organizations committed to equal and quality public education opportunities for Montana students. Because HB 393 is antithetical to both quality and equality in education, DRM and MQEC join together in asking the Court to declare HB 393 unconstitutional and to enjoin its enforcement.

PARTIES

A. Plaintiffs

6. MQEC is a nonprofit organization headquartered in Helena, Montana. Formed in 2001, MQEC is one of the state's largest education advocacy organizations. Its mission is to serve as a guardian of Article X's guarantees and to advocate

for adequate and equitable public school funding to provide quality education for each of Montana's public school students.

7. MQEC represents the interests of more than 100 school districts, six statewide public education advocacy organizations, and innumerable teachers, trustees, administrators, and other public school employees. MQEC represents public school districts that range from large to small, rural to urban, and east to west.
8. HB 393 harms MQEC by depriving public schools of crucial tax dollars and interfering with elected officials' constitutional obligations. It diminishes public school districts' general fund money with no commensurate decrease in the cost of providing a quality education. And it prevents trustees from fulfilling their constitutional mandate under Article X. In response, MQEC will be forced to expend considerable resources to advocate for adequate funding and to equip constituent organizations to help teachers, trustees, and administrators serve students effectively. HB 393 threatens the funding, stability, and public regard of the public education system, thereby directly compromising MQEC's mission of protecting and strengthening Montana's commitment to public education.
9. DRM is a nonprofit organization headquartered in Helena, Montana. DRM's mission is to protect and advocate for the human, legal, and civil rights of Montanans with disabilities while advancing dignity, equality, and self-determination.
10. DRM is the federally mandated civil rights protection and advocacy system (P&A) for Montana. *See, e.g.,* Developmental Disabilities Assistance & Bill of

Rights Act of 2000 (“DD Act”), 42 U.S.C § 15041, *et seq.* Under federal law, DRM is required to “pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of [people with disabilities¹] . . . with particular attention to members of ethnic and racial minority groups.” *Id.* at § 15043(a)(2)(A). P&As “are responsible for enforcing federal and state law on behalf of individuals with disabilities who otherwise would face perhaps insurmountable obstacles to seeing their rights enforced and their interests protected.” *Ind. Prot. & Advoc. Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr.*, 642 F. Supp. 2d 872, 876 (S.D. Ind. 2009). In addition to pursuing the rights of those it protects, a P&A system may “press[] its own rights.” *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 251 (2011).

11. DRM represents and advocates for school-aged children and youth with disabilities by providing assistance, advocacy, and legal representation to prioritize and protect access to a free appropriate public education (FAPE) for all students with disabilities. DRM works to ensure that students with disabilities are safe and fully integrated into their school environment; that parents’ and students’ rights are protected and advanced; and that state and local educational agencies are aware of and comply with students’ rights under

¹ The DD Act refers specifically to individuals with developmental disabilities, however under other federal P&A legislation, DRM’s authority extends broadly to people with any type of disability, of any age, and in a variety of settings, including education. *See, e.g.*, 42 U.S.C. § 10801, *et seq.* (P&A for individuals with mental illness); 29 U.S.C. § 794e, *et seq.* (P&A for individual rights).

the Individuals with Disabilities in Education Act (“IDEA”), Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (“ADA”).

12. Because DRM is directly responsible for enforcing federal and state law on behalf of individuals with disabilities, HB 393 harms DRM by harming students with disabilities. Not only does it make serving students with disabilities who remain enrolled in public school more difficult, HB 393 does not ensure that students with disabilities who opt for an ESA and leave the public school system will receive a free and appropriate public education. Many students whom DRM serves will necessarily remain in public schools while ESAs reduce funding, leaving schools with less to invest in educating students with disabilities in the least restrictive environment. Because public education is an essential component to achieving dignity, equality, and self-determination for Montanans with disabilities, HB 393 compromises DRM’s mission. Protection of and advocacy for the civil, legal, and human rights of Montanans with disabilities is not only germane to DRM, but is the reason for DRM’s existence.

B. Defendants

13. Defendant State of Montana is a duly admitted state of the United States.
14. Defendant Greg Gianforte is the Governor of the State of Montana and is responsible for the execution of state laws.
15. Defendant Elsie Arntzen is the Montana Superintendent of Public Instruction, responsible for the general supervision of Montana public schools and districts, including public school accreditation.

16. The Superintendent administers HB 393's ESA program. HB 393 requires the Superintendent to reimburse parents for an array of private educational expenses and permits the Superintendent to approve reimbursement for educational expenses not otherwise specified in HB 393. The Superintendent is responsible for signing ESA contracts on behalf of the State.

JURISDICTION & VENUE

17. Plaintiffs bring this action under the Montana Constitution. Article VII, Section 4 of the Montana Constitution provides this Court with original jurisdiction, as does § 3-5-302, MCA.
18. This Court has jurisdiction to grant declaratory relief pursuant to § 27-8-201, *et seq.*, MCA, and injunctive relief pursuant to § 27-19-101, *et seq.*, MCA.
19. Venue is proper in Lewis & Clark County under § 25-2-126(1), MCA.

COMMON ALLEGATIONS

Public Education in Montana's Constitutional Framework

20. The Montana Constitution is a modern document, intended "to meet the changing circumstances of contemporary life" and to "stand on its own footing and . . . to provide individuals with fundamental rights and protections far broader than those available through the federal system." *Dorwart v. Caraway*, 2002 MT 240, ¶ 94, 312 Mont. 1, 58 P.3d 128 (Nelson, J., concurring) (quoting Dahood, Amicus Br.; Mont. Const. Conv., II Verbatim Tr., *Bill of Rights Comm. Proposal*, at 619 (Feb. 22, 1972)).

21. About public education, the framers were unequivocal: “It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.” Mont. Const. art. X, § 1(1).
22. In its first sentence, Article X, Section 1(1) sets an ambitious goal: “to establish a system of education which will develop the full educational potential of each person.” *Helena Elem. Sch. Dist. No. 1 v. State*, 236 Mont. 44, 53, 769 P.2d 684, 689 (1989). The guarantee that follows is neither abstract nor aspirational: every Montanan “is guaranteed equality of educational opportunity.” *Id.* at 52–53. As a constitutional provision, it is unusual—there is no “other instance in which the Constitution ‘guarantees’ a particular right.” *Id.* The guarantee is binding on all three branches of government, and all state officials at every level. *Id.* at 53, 769 P.2d at 690.
23. The Constitution obligates the legislature to “provide a basic system of free quality public elementary and secondary schools.” Mont. Const. art. X, § 1(3). When, for example, the legislature failed to adequately fund state education, the Montana Supreme Court concluded that the legislature forced “an excessive reliance on permissive and voted levies” and necessarily “failed to provide a system of quality public education granting to each student the equality of educational opportunity” that Article X guarantees. *Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690.

24. While the legislature may “provide such other educational institutions, public libraries, and educational programs as it deems desirable,” it “shall fund and distribute in an equitable manner to the school districts the state’s share of the cost of the . . . school system.” *Id.* (emphasis added); *see also Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 22, 326 Mont. 304, 109 P.3d 257 (concluding “that the educational product of the current school system is constitutionally deficient and that the Legislature currently fails to adequately fund Montana’s public school system”); *Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690 (“affirm[ing] that . . . spending disparities among the State’s school districts translate into a denial of equality of educational opportunity.”).
25. Title 20 implements the legislature’s constitutional obligation, providing, among other things, for an “educational program . . . which represent[s] the minimum standards upon which a basic system of free quality public elementary and secondary schools is built,” “educational programs to provide for students with special needs,” and the “preservation of local control of schools in each district vested in a board of trustees.” Section 20-9-309(2), MCA (emphasis added).
26. In developing funding mechanisms, the legislature must consider, *inter alia*, “the needs of students with special needs” and “the ability of school districts to attract and retain qualified educators.” Sections 20-9-309(3)(d), (f), MCA. It must “determine the costs of providing the basic system of free quality public elementary and secondary schools,” § 20-9-309(4)(a), MCA, and “establish a

funding formula that . . . reflects the costs associated,” § 20-9-301(4)(b)(1), MCA. In short, legislative funding must promote quality public education.

27. Consistent with its constitutional obligation to fund the public schools, the legislature imposed a restriction on itself: a law cannot “require[] a school district to” do anything “that will require the direct expenditure of additional funds” unless it also “provide[s] a specific means to finance the activity, service, or facility other than the existing property tax mill levy.” Section 1-2-113, MCA (emphasis added). “Any law that fails to provide a specific means to finance the service or facility is not effective until a specific means of financing . . . is provided by the legislature.” *Id.*
28. The legislature passed Title 20 to implement Article X. As Justice Rice has explained,

I would nonetheless refrain from suggesting how to “best construct” the educational system, and upon what factors it must do so . . . if I was not convinced that the “suggestion” was, in fact, constitutionally compelled. Truly, the debates of the delegates demonstrate that, in assigning to the Legislature the task of designing the system, they intended the Legislature to assess the educational needs of the state before deciding funding issues. After the state has assessed the needs and established what a minimum program ought to be, we feel that the state ought then to provide, by whatever means it sees fit, for the funding of the program. Once the needs for a basic quality system of elementary and secondary schools have been realistically assessed, the state has the obligation to guarantee.

Columbia Falls Elem., ¶ 57 (Rice, J., concurring) (quoting Del. Harbaugh & Del. Habedank, Mont. Const. Conv., VI Verbatim Tr., at 1961–62).

Local Control over Public Education

29. The framers created a system of public school oversight, forming a statewide Board of Public Education “to exercise general supervision over the public school system,” Mont. Const. art. X, § 9(3)(a), and reserving for local elected school boards “[t]he supervision and control of schools in each school district,” Mont. Const. art. X, § 8. The two-board system rectified at least two problems with the previous structure. First, under the 1889 Montana Constitution, a statewide Board of Education held a supervisory role over public education, but the legislature retained too much authority over its powers and duties. Mont. Const. Conv., VI Verbatim Tr., at 2049–51 (Mar. 11, 1972) (Del. Champoux). Second, the two-board structure responded to concerns about unresponsive state-level bureaucracy that lacked genuinely local control. *Id.* at 2051.
30. By constitutional design, the Board of Public Education is the only body at its level and of its kind for public schools. *Id.* at 2049–53; Mont. Const. art. X, § 9.
31. Local school boards play a separate but similarly essential and deliberately crafted constitutional role. The framers delegated local “supervision and control” to “a board of trustees to be elected as provided by law.” Mont. Const. art. X, § 8; *see* Mont. Const. Conv., VI Verbatim Tr., at 2047 (“[O]ur local school boards certainly should have constitutional status.”) (Del. Johnson). They used the word “control” to “emphasize that [they] want[ed] the local public school boards to have as much power as possible.” Mont. Const. Conv., VI Verbatim Tr., at 2050 (Mar. 11, 1972) (Del. Champoux).

32. Local school boards must be able to supervise operations and control district budgets—including overseeing finances through comprehensive budget and financial management and exerting exclusive control over the district’s general fund. *See* § 20-3-324, MCA. HB 393 renders local control a mirage by forcing districts to pay out general fund monies required to deliver a quality education.

Prohibited Payments under the Montana Constitution

33. The Montana Constitution expressly prohibits the legislature from making appropriations for “educational . . . purposes to any private individual, private association, or private corporation not under control of the state.” Mont. Const. art. V, § 11(5) (emphasis added).

34. This strict prohibition was no accident. The framers prioritized public education and worried about protecting and maintaining its funding. *See, e.g.*, Mont. Const. Conv., VI Verbatim Tr., at 2013–26 (Mar. 11, 1972) (discussion of amendment exempting “federal funds provided to the state for the express purpose of distribution to non-public education” from the general prohibition on aid to sectarian schools in Article X, Section 6(1)); *id.* at 2022 (Del. Harper, having witnessed attempts to use private schools to avoid desegregation, asked where the Constitution would prohibit “subversion of public school moneys . . . [to] private institutions”; Del. Champoux identified Article V, which “says that there will be no moneys given to private corporations and so forth”).

35. Legislation that uses state money to benefit private entities violates Article V, Section 11(5). *See Hollow v. State*, 222 Mont. 478, 486, 723 P.2d 227, 232 (1986)

“What we do not and cannot condone is the direct use of tax monies by legislative provision which in effect directly pledges the credit of the state.” (emphasis added). Even if initial deposits are into a state-administered account—like a state-established ESA trust account—programs that ultimately route taxpayer money to private entities violate Section 11(5). *See, e.g., White v. State*, 233 Mont. 81, 87, 759 P.2d 971, 974 (1988) (unconstitutional benefit to private entities where legislature obligated taxpayer funds to ensure a debt service fund remained solvent, effectively pledging state money to secure Board-issued bonds “for the benefit of private businesses”).

36. Generally, so long as the spending in question remains “under the control of the state, the constitutional mandate is satisfied.” *Grossman v. State*, 209 Mont. 427, 455–56, 682 P.2d 1319, 1333–34 (1984). But using state money to secure “bonds or guaranties being used to benefit private business ventures” violates Section 11(5). *White*, 233 Mont. at 86, 759 P.2d at 974; *Hill v. Rae*, 52 Mont. 378, 158 P. 826, 831 (1916) (provision unconstitutional in part because the state could not “direct the conduct or judgment of mortgagors” handling their own property); *cf. Duck Inn, Inc. v. Mont. State Univ.-N.*, 285 Mont. 519, 525, 949 P.2d 1179, 1183 (1997) (law constitutional where “implicit, but clear, rationale behind the statute is to minimize the tax support necessary to fund units of the Montana university system by leasing campus facilities”).
37. Article VIII, Section 14 imposes a separate clarifying restriction on how the legislature can distribute money. It provides that “no money shall be paid out

of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.” Mont. Const. art. VIII, § 14.

38. That is, Section 14 requires that state treasury money be spent only by appropriation. “[A]n appropriation is 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.” *Meyer v. Knudsen*, 2022 MT 109, ¶ 12, 409 Mont. 19, 510 P.3d 1246 (cleaned up); *see also Nicholson v. Cooney*, 265 Mont. 406, 415, 877 P.2d 486, 491 (1994). It applies to state treasury money, and does not permit the legislature to write blank checks. *See generally Grossman*, 209 Mont. at 461–62, 682 P.2d at 1336–37.
39. Education funding quintessentially is state treasury money. *Columbia Falls Elem.*, ¶¶ 24–25; *see, e.g.*, § 20-6-330(1), MCA (requiring specified payments from state to public schools); § 20-9-325, MCA (same); § 20-9-327, MCA (same).
40. HB 393 is a blank check. It fails to limit the amount of state money that may be routed to private individuals and how that money may ultimately be spent.

Delegations of Legislative Power Similarly Prohibited

41. Article V, Section 1 gives the legislative body structure and vests the legislature with some authority that cannot be delegated to other bodies or officials. To delegate authority or discretion within constitutional bounds, “it is essential that the Legislature shall fix some standard by which the officer or board to whom the power is delegated may be governed, and not left to be controlled by caprice.” *Douglas v. Judge*, 174 Mont. 32, 40, 568 P.2d 530, 534 (1977).

42. “If the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.” *Huber v. Groff*, 171 Mont. 442, 457, 558 P.2d 1124, 1132 (1976). If instead a law’s “provisions are sufficiently clear, definite, and certain to enable the agency to know its rights and obligations,” then a statute “validly delegates administrative authority.” *Id.*; *Douglas*, 174 Mont. at 39, 568 P.2d at 534 (collecting cases).

House Bill 393: Eligibility and Reimbursable Educational Resources

43. Representative Sue Vinton sponsored House Bill 393. It passed by a two-vote margin on April 27, 2023. A true and correct copy of the enrolled version of HB 393 is attached as Exhibit A. The bill went into effect on July 1, 2023. Ex. A, HB 393 § 16.
44. During the 2023–24 school year, the Office of Public Instruction will begin implementing HB 393. Mont. Off. of Pub. Instruction, *HB 393 Leg. Summ.* (Aug. 21, 2023).² Parents may access ESA funds beginning in the 2024–25 school year. *Id.*
45. HB 393’s claimed primary purpose is to create ESAs for “qualified students.”
46. To qualify, a child must be identified as a “child with a disability” under the IDEA, between the ages of 5 and 19, and not currently enrolled in a department

² Available at [https://opi.mt.gov/Portals/182/Page%20Files/Parent%20Resources/2023.08.21%20HB0393%20summary%20\(final\).pdf?ver=2023-08-21-170823-070](https://opi.mt.gov/Portals/182/Page%20Files/Parent%20Resources/2023.08.21%20HB0393%20summary%20(final).pdf?ver=2023-08-21-170823-070).

of corrections commitment youth program or the Montana school for the deaf and blind. Ex. A, HB 393 § 3(7)(a)–(b).

47. Qualified students include any student who was counted by a school district for ANB funding, resided outside the state in the previous year, or is eligible to enter kindergarten in the current year. *Id.* § 3(7)(c)(i)–(iv). They need not enroll in a private or nonpublic online school to qualify. *Id.* § 4(4). Kindergarten-eligible students never need to intend to enroll in a public school as they can be identified under IDEA pre-enrollment.³ *Id.* § 3(7)(iv). Nor does HB 393 require new-

³ An eligible kindergartener must have been identified as a “child with a disability” under the IDEA. Ex. A, HB 393 § 3(7)(a)(i). The “Child Find” requirement under IDEA Part B obligates the state via its school districts to identify, locate, and evaluate all children, ages 3 through 21, who are suspected to be children with disabilities in need of special education and related services. *See* 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111; Mont. Admin. R. 10.16.3125; *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016). The agency, a parent, or a school professional may initiate the child find process, but it is the state’s obligation, via local education agencies, to meet the child find obligation. *See generally* U.S. Dep’t of Educ., *How a Student Is Identified as Having a Disability & Needing Special Educ. Servs.*, LDOonline, <https://www.ldonline.org/ld-topics/special-education/how-student-identified-having-disability-and-needing-special-education>.

Child find is a time- and resource-intensive process and often requires substantial parental advocacy or privately-paid evaluations in addition to school evaluations to determine IDEA eligibility. As a result, potential ESA participants may be limited either to children with more readily identifiable disabilities or to families with the time and resources to advocate to identify a disability at the earliest stage. This limitation increases the likelihood that those most able to use ESAs will be wealthier, more educated families, at the direct expense of families with fewer resources. *See, e.g.*, Rob O’Dell & Yvonne Wingett Sanchez, *State money helping wealthier Arizona kids go to private schools*, Ariz. Republic (Feb. 23, 2016), available at <https://www.azcentral.com/story/news/arizona/politics/education/2016/02/23/state-money-helping-wealthier-arizona-kids-go-private-schools/80303730/> (“[I]t’s largely the parents of disabled and special-needs children from wealthy and high-performing schools using the ESAs to put their children into private schools, while parents of disabled children from poorer districts are not.”).

resident qualified students ever to have attended public school, extending a nationwide invitation for parents of qualified students to establish residency in Montana and pull public funds from the state treasury. *Id.* § 3(7)(c)(i)–(iii).

48. HB 393 provides that parents of qualified students shall be reimbursed for any of eleven ostensibly specific “education resources,” which include, *inter alia*, curriculum, tutoring, entrance examinations, books, tuition and fees at eligible postsecondary institutions, and transportation to educational services. The bill fails to define the vast majority of these terms. *Id.* at §§ 4(1)(a)–(k).
49. In fact, HB 393 authorizes the Superintendent to approve “any other educational expense” for reimbursement. Ex. A, HB 393 § 4(1)(l); *see also HB 393 Leg. Summ.* HB 393 offers no parameters for the Superintendent to determine what qualifies as an “educational expense.”
50. Parents who participate must sign a contract with the Superintendent releasing the “resident school district from all obligations to educate the qualified student, including any requirements that the district provide a free and appropriate education to the qualified student or develop an individualized education program for the qualified student.”⁴ Ex. A, HB 393 § 5(1)(b). Participating

⁴ The availability of FAPE to “all children with disabilities residing in the state” is a core requirement of the IDEA. *See* 20 U.S.C. § 1412(a)(1)A; *see also Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017). The term is also used, with a different meaning, to elucidate the anti-discrimination requirements for K-12 schools under Section 504. *See Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008) (FAPE under Section 504 similar, but not identical, to FAPE under IDEA). HB 393’s text does not distinguish between a Section 504 FAPE or an IDEA FAPE in its broad waiver of rights requirement.

students are not considered enrolled in their resident school district. *Id.* § 9(5). Unlike the IDEA’s provisions governing a parent’s authority to decline services, which provides important procedural safeguards and preserves parents’ rights to change their minds, the terms of HB 393 appear to require a full and unequivocal waiver of the student’s rights and a release of the school district from its affirmative FAPE obligations under IDEA and Section 504. *Id.* § 5(1)(b); *see generally* U.S. Dep’t of Educ., Off. of Special Educ. & Rehab. Servs., *Questions & Answers on Serving Children with Disabilities Placed by Their Parents in Private Schs.* (Feb. 2022).⁵

51. Participating students may homeschool, attend private school, or attend an online nonpublic school. Ex. A, HB 393 §§ 3(6)(a)–(e); *see also* § 20-5-109(5), MCA. A “qualified school” is “not an agent of the state or federal government,” Ex. A, HB 393 § 8(2), and “[t]he superintendent of public instruction or any other state agency may not regulate the educational program of a qualified school that enrolls a qualified student, except” to provide for minimal record keeping, attendance, and course of study requirements set out in § 20-5-109, MCA; *id.* § 8(3). Qualified schools are not subject to the IDEA or Montana’s quality education guarantee. Ex. A, HB 393 § 3(6); *see also* § 20-5-109, MCA.

⁵ Available at chrome-extension://efaidnbnmnnibpcajpcglclefindmkaj/https://sites.ed.gov/idea/files/QA_on_Private_Schools_02-28-2022.pdf.

House Bill 393: ESA Structure and Fiscal Impact

52. To create ESAs, HB 393 establishes a trust within the Office of Public Instruction using “money remitted . . . from the [resident] district’s general fund,” Ex. A, HB 393 § 9(3)(a), paid out monthly between August and May, *id.* §§ 9(1)–(2). The money remitted “must be from the [resident] district’s general fund; [and] may not include revenue from the guarantee account.” Ex. A, HB 393 § 9(3)(a)–(b). That “remitted money” is money appropriated to the school district as part of the K-12 Base Amount for School Equity (“BASE”) aid—or the “minimum general fund budget that all public-school districts must adopt.” Mont. Off. of Pub. Instruction, *Understanding Mont. Sch. Fin. & Sch. Dist. Budgets*, at 4 (May 2020).⁶
53. In other words, HB 393 funds ESAs using resident school districts’ general funds. Ex. A, HB 393 § 9(3)(a). “The general fund is the largest and most important part of the school district’s overall budget.” *Columbia Falls Elem.*, ¶ 24. It is made up of state, local, and other revenue. Leg. Servs. Div., *K-12 Funding Basics – Dist. Gen. Fund*, at 1 (2022).⁷
54. Local funding comes from property tax levies. *Understanding Mont. Sch. Fin.*, at 5. Other revenue includes “non-levy revenues, such as oil and gas, tuition,

⁶ Available at https://opi.mt.gov/Portals/182/Page%20Files/School%20Finance/Accounting/About%20School%20Finance/Understanding%20%20School%20Finance/Understanding%20Montana%20School_Finance_%20FY%202020_DRAFT%20KF%20Edits.pdf.

⁷ Available at https://leg.mt.gov/content/Publications/fiscal/leg_reference/Brochures/2022-school-funding-brochure.pdf.

coal gross proceeds, interest earnings, block grants, natural resources development K12 funding payment, and fund balance reappropriated.” *Id.*

55. Of special relevance here, the state’s BASE budget contribution “is equal to 80% of the basic entitlement, 80% of the district’s per-ANB entitlement, 100% of the Quality Educator component, 100% of the At-Risk Student component, 100% of the Indian Education for All component, 100% of the American Indian Achievement Gap component, 100% of the Data for Achievement component, 140% of the district’s Special Education allowable cost payment, and 40% of the district’s prorated Special Education cooperative cost payment.” *Id.* at 12.
56. ANB abbreviates “Average Number Belonging,” which is a student count formula “used for school funding purposes . . . based on factors that include enrollment on two count dates, [Pupil-Instruction-Related] days, and an average school year of 180 days.” *Understanding Mont. Sch. Fin.*, at 4.
57. Generally, ANB accounts for part-time and extracurricular-only students with a fractional ANB. *See, e.g.*, § 20-9-311(13)(b)(ii), MCA (“Each completed extracurricular activity lasting longer than 18 weeks may be counted as one-eighth enrollment.”). Fractional ANB may be as low as one-sixteenth. Section 20-9-311(13)(b)(i), MCA. Schools use fractional ANB to accurately account for services. *See generally* § 20-9-311, MCA (setting out the ANB calculation). ANB is “used to determine ANB based entitlements as well as calculate school BASE and maximum general fund budgets.” *Understanding Mont. Sch. Fin.*, at 4 (emphasis added).

58. HB 393 sets the “ESA student amount” as the sum of:

- (a) the data-for-achievement rate under 20-9-306;
- (b) the Indian education for all payment rate under 20-9-306;
- (c) the per-ANB amounts of the instructional block grant and related service block grant under 20-9-321; and
- (d) the applicable per-ANB maximum rate established in 20-9-306 for the student multiplied by the ratio of adopted general fund budget to maximum general fund budget in the prior year.

Ex. A, HB 393 §§ 3(2)(a)–(d). HB 393 does not account for fractional ANB.

59. The ESA student amount is based on school districts’ adopted general fund budget amounts, only 69 percent of which is funded by the state on average. Mont. Off. of Pub. Instruction, *FY24 Recap of All Sch. Dist. Gen. Fund Budgets Off. of Pub. Instruction: FY2024 Budget Spreadsheet*.⁸ The remaining 31 percent is funded with a forced increase in local property taxes, which would necessarily be increased to fund ESA amounts. *Id.*; Ex. B, Gov.’s Off. of Budget & Program Planning, *Fiscal Note 2025 Biennium: HB0393*, at 5 (Feb. 16, 2023) (hereinafter “Fiscal Note”).

60. Of Montana’s 395 school districts, well over a quarter—that is, 118—have adopted budgets that exceed the maximum general fund budget, while another quarter have adopted budgets between 97 and 100 percent of the maximum. FY2024 Budget Spreadsheet. When state funding cannot meet the need, local

⁸ Available at <https://opi.mt.gov/Leadership/Finance-Grants/School-Finance/OPI-Financial-Data-Files> (last accessed Jan. 21, 2024). To access, select “School Budget/Expenditure Data,” then “Budget,” then “FY2024 Budget.”

property taxes make up the difference. Mont. Off. of Pub. Instruction, *Special Educ. Report to the Bd. of Pub. Educ.*, at 22 (June 2022).⁹

61. Using HB 393's funding formula, the fiscal note calculates that for elementary school students in 2025, the minimum annual ESA amount is \$5,390.32 and the maximum is \$6,651.72. Ex. B, Fiscal Note, at 2. For high school students, the minimum is \$6,804.72 and the maximum is \$8,419.72. *Id.* To meet HB 393's requirements, "[s]chool districts may adopt higher general fund budgets to offset the loss of funds related to [HB 393] and therefore, local property taxes could increase." *Id.* Additionally, "[t]his funding would not be budgeted and would reduce funding for other instruction-related expenditures." *Id.*
62. Montana's statewide general fund education budget is \$1.26 billion for 2024. FY2024 Budget Spreadsheet. The total includes \$43.1 million in special education funds. *Id.* (calculated by summing columns AH and AI).
63. In 2022, the Office of Public Instruction reported that "local school districts have absorbed the largest portion of special education costs by increasing their contribution to over \$87.96 million dollars in state fiscal year 2021." *Special Educ. Report*, at 22. The local tax portion of special education spending was "over 50 percent of the total expenditures for special education." *Id.*
64. If every qualified student used an ESA, HB 393 would require spending more than 12 percent of the general fund budget on reimbursements. The Governor's

⁹ Available at <https://opi.mt.gov/Portals/182/Page%20Files/Special%20Education/IDEA%20Data/Special%20Education%20Report%20to%20the%20Board%20of%20Public%20Education.pdf?ver=2020-07-21-122718-700>.

Office of Budget and Program Planning issued a fiscal note for HB 393 explaining that “[i]f all 21,127 eligible students participated in the education savings account, the program would transfer approximately \$140 million annually of state funding and local property tax dollars from the local public-school districts to the education savings account.” Ex. B, Fiscal Note, at 5. To cover the \$140 million, schools would be required to spend 325 percent of the \$43.1 million amount of state funding dedicated to special education in 2024. FY2024 Budget Spreadsheet; *Special Educ. Report*, at 22–23. The legislature made no attempt to limit or even calculate HB 393’s potential budgetary impact.

65. Reducing the number of students in a classroom does not reduce the cost of educating the class. Ex. B, Fiscal Note, at 5 (“Approximately 90% of [public school] expenditures go to teacher pay and the cost is the same with nine or ten students in the classroom.”).
66. The fiscal note admonished that HB 393 fails to account for fractional ANB students in ESAs, but the bill language remained unchanged. *See* Ex. B, Fiscal Note, at 6 (“Language is needed for HB 393 to indicate the amount of the education savings account payment allocated to a student who was enrolled on a part-time basis.”). As written, HB 393 allows a student who participated in a single extracurricular activity in the preceding school year and who counted for one-sixteenth enrollment (generating \$504 to the district) to seek reimbursements equivalent to the full ESA amount (up to \$8,419.72 for a high school student in 2025). *See* Ex. A, HB 393 §§ 3(2), 9(1)–(3).

67. Failing to adequately fund a new program violates Article X—particularly the legislature’s self-imposed requirement to provide a source of funding “other than the existing property tax mill levy,” § 1-2-113(1), MCA, when establishing new educational programs.

HB 393: Long-Term Student-by-Student Impact

68. HB 393 requires that the Superintendent “ensure that the participating student is included in the resident school district’s ANB calculation . . . in any year that the student remains otherwise eligible for inclusion and participates in the program.” Ex. A, HB 393 § 9(5).
69. In doing so, HB 393 preserves qualified students’ eligibility year after year, for nearly a decade and a half, by ensuring that one of the necessary conditions for eligibility—being counted in the previous year’s ANB—is continuously met. So, once a qualified student has opted into the ESA program, they remain a participant unless and until they enroll in a public school or turn 19. As a result, public schools must distribute a student’s private allotment of public money to subsidize private educational resources from the time the student’s ESA is created until they become ineligible for participation. *See* HB 393 § 3(7).
70. Adjusting for annual inflation to ANB as required by § 20-9-326, MCA, and starting with the payments HB 393 would guarantee starting in 2025, a home- or private-schooled kindergarten-eligible child can begin drawing public money until they turn 19 for a total of \$125,888, as follows:

Age of qualified student	Grade	Fiscal year	Max ESA Contribution
5	Kindergarten	2025	\$6,651
6	1	2026	\$6,851
7	2	2027	\$7,056
8	3	2028	\$7,268
9	4	2029	\$7,486
10	5	2030	\$7,710
11	6	2031	\$7,942
12	7	2032	\$8,180
13	8	2033	\$8,425
14	9	2034	\$10,985
15	10	2035	\$11,314
16	11	2036	\$11,654
17	12	2037	\$12,003
18	13	2038	\$12,364
Total cumulative ESA account earnings:			\$125,888

71. A qualified student’s ESA account accrues money until the student reaches age 19, Ex. A, HB 393 § 3(7)(ii), but the student retains access to spend ESA funds until their 24th birthday, *id.* § 9(6)(b). Nothing in HB 393 requires that parents seek reimbursement the same year that the money is remitted.
72. If they choose, parents may wait until their child is 18 to 24 years old, Ex. A, HB 393 § 9(6)(b), to access the accrued money—up to fourteen years of state contributions—for reimbursement of, for example, “eligible postsecondary institution tuition, books, online courses, or other fees,” *id.* § 4(1)(h). “Eligible postsecondary institution’ means an accredited postsecondary institution located in Montana,” such as Carroll College, Rocky Mountain College, or any public Montana University System school. *Id.* § 3(1). Thus, parents of a qualified student can use public money meant for special education services to

pay instead for post-secondary tuition at any in-state accredited college or university decades after the first extraction of public funds.

HB 393: Relationship to Rural Schools

73. No other state in the nation has a higher percentage of rural schools or small rural districts, *see* Mont. State Univ. Cent. for Research on Rural Ed., *Overview*.¹⁰ And HB 393’s funding scheme will have a harsh impact on rural schools. “[D]istance, geography, poverty, housing discrimination, and lack of access to transportation” all affect access to ESAs. Annabelle V. González, *Who Benefits from Leaving the “Bad” School?*, 14 FIU L. Rev. 649, 660 (2021) (quoting Monique Langhorne, *The African American Community: Circumventing Compulsory Education Systems*, 33 Beverly Hills B. Ass’n J. 12, 24 (2000)). The legislature has obligated itself to consider legislation’s impact on education in rural areas. *See* § 20-9-309(3)(b), MCA (legislature must consider, at a minimum, “the needs of isolated schools with low population densities”).
74. “Similar education funding cuts have stronger negative implications for achievement in rural districts.” Emily Rauscher, *Does Money Matter More in the Country? Educ. Funding Reductions & Achievement in Kansas, 2010–2018*, 6 AERA Open, 1 (Oct.–Dec. 2020). A set-sum reduction in funding generally draws down a larger proportion of rural districts’ budgets. *Id.* Rural districts cannot match larger urban districts’ economies of scale, and must spend more money per pupil to provide the same services. *See* Tammy Kolbe et al., *The*

¹⁰ Available at <https://www.montana.edu/crre/overview.html>.

Additional Cost of Operating Rural Schools: Evidence from Vermont, 7 AERA Open (Feb. 2021).

75. Indeed, Montana’s special education cooperatives system exists because the cost of providing specialized services, such as speech or physical therapists and psychologists, can be prohibitive for smaller districts. To maximize their special education services, “small- and mid-sized school districts usually pool their resources by forming a cooperative.” *Understanding Mont. Sch. Fin.*, at 12.

CLAIMS FOR RELIEF

COUNT I:

(Violation of the Prohibition on Appropriations to Private Entities Mont. Const. art. V, § 11(5))

76. Plaintiffs incorporate all foregoing allegations.
77. The Montana Constitution provides: “No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.” Mont. Const. art. V, § 11(5).
78. HB 393 routes state treasury money to private institutions at the discretion of private individuals. HB 393 obligates local school districts to use their general funds, which largely comprise local property tax and state tax base dollars, to fund ESAs. Using these funds to directly benefit private entities violates Article V, Section 11(5). *See Hollow*, 222 Mont. at 486, 723 P.2d at 232; *White*, 233 Mont. at 86, 759 P.2d at 974.

79. Without continuous taxpayer funding otherwise intended for the school districts' general funds, HB 393 cannot exist.
80. Because HB 393 violates Montana Constitution Article V, Section 11(5), Plaintiffs request that the Court declare it unconstitutional and unenforceable.

COUNT II:

**(Violation of the Right to Equality of Education, Mont. Const. art. X, § 1(1)
and implementing statutes, including § 1-2-113, MCA)**

81. Plaintiffs incorporate all foregoing allegations.
82. The Montana Constitution provides: “It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.” Mont. Const. art. X, § 1(1).
83. As a result, equality of education is a constitutional guarantee. *Helena Elem.*, 236 Mont. at 52–53, 769 P.2d at 689. To meet this guarantee, the state must distribute funding to school districts equitably. *Columbia Falls Elem.*, ¶ 22.
84. School funding does not function on a “one-in, one-out” model. HB 393 impermissibly takes a student’s per-ANB associated cost out of school districts’ general funds and passes it into private hands on a reimbursement basis with few requirements and little oversight. The school district is poorer while total operational costs—including teacher salaries—remain largely unchanged.
85. To recoup the funding deficit, school districts and local governments must raise property taxes, forcing public schools into impermissible “excessive reliance” on

property tax levies to maintain a constitutional standard of free appropriate public education. *Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690.

86. As part of the legislature's obligation to guarantee equality of education, § 1-2-113(1), MCA, provides that when a law "requires a school district to perform an activity or provide a service or facility and that will require the direct expenditure of additional funds," the legislature must provide a source of funding "other than the existing property tax mill levy." *See Columbia Falls Elem.*, ¶ 57 (Rice, J., concurring).
87. Accordingly, a law that fails to provide non-levy funding cannot take effect until the legislature provides an appropriate and specific means of funding. Section 1-2-113(1), MCA.
88. HB 393 draws money from school districts' general funds, which consist in large part of property tax dollars. The legislature provided no alternative means of financing ESAs.
89. Given that HB 393 is impermissibly funded, Plaintiffs request that the Court declare it unlawful and unenforceable until the legislature complies with § 1-2-113, MCA, by providing an appropriate means of funding.
90. And because HB 393 violates Montana Constitution Article X, Section 1(1), Plaintiffs request that the Court declare it unconstitutional and unenforceable.

COUNT III:

**(Violation of the Prohibition on Unappropriated Payments,
Mont. Const. art VIII, § 14,
and the Nondelegation Doctrine, Mont Const. art. V, § 1)**

91. Plaintiffs incorporate all foregoing allegations.
92. Article VIII, Section 14 provides: “[N]o money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.” Mont. Const. art VIII, § 14.
93. Thus, Article VIII, Section 14 requires that state treasury money be spent only by appropriation. *Huber*, 171 Mont. at 460, 558 P.2d at 1134; *Grossman*, 209 Mont. at 461–62, 682 P.2d at 1336–37; *see also Nicholson*, 265 Mont. at 415, 877 P.2d at 491.
94. HB 393 funds ESAs solely from the local school districts’ general funds. Ex. A, HB 393 § 9(3)(a).
95. General funds—“the largest and most important part of a school district’s overall budget”—are largely derived from taxation and considered money in the state treasury. *Columbia Falls Elem.*, ¶¶ 24–25.
96. HB 393 fails to specifically appropriate the ESA money that reimburses private spending. Nor does it place any limitation on the number of ESA accounts that may be created or the amount of money that may be used to fund them.
97. Article V, Section 1 provides: “The legislative power is vested in a legislature consisting of a senate and a house of representatives.”

98. When delegating power, the legislature must provide standards by which that power is exercised. *Huber*, 171 Mont. at 457, 558 P.2d at 1132; *Douglas*, 174 Mont. at 39, 568 P.2d at 534.
99. HB 393 also delegates standardless spending authority over the reimbursements to the Superintendent of Public Instruction. *See, e.g.*, Ex. A, HB 393, § 4(1)(l) (authorizing reimbursement for “any other educational expense approved by the superintendent of public instruction”).
100. Because HB 393 violates Montana Constitution Article VIII, Section 14, and Article V, Section 1, Plaintiffs request that the Court declare it unconstitutional and unenforceable.

COUNT IV:

(Violation of Supervision & Control Vested in Local Board of Trustees Mont. Const. art X, § 8)

101. Plaintiffs incorporate all foregoing allegations.
102. The Montana Constitution provides: “The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.” Mont. Const. art X, § 8.
103. Local boards of trustees exercise control over, *inter alia*, their respective school districts’ budget and financial business.
104. HB 393 usurps local control from the board of trustees by requiring nondiscretionary expenditures out of school districts’ general funds.
105. Because HB 393 violates the Montana Constitution Article X, Section 8, Plaintiffs request that the Court declare it unenforceable and unconstitutional.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court enter:

1. A declaratory judgment that HB 393 is unconstitutional;
2. An order enjoining Defendants and all agencies, agents, and employees from enforcing any aspect of HB 393;
3. An order granting any other appropriate relief that may be necessary to enjoin implementation of HB 393;
4. An award of attorneys' fees and costs incurred in bringing this action pursuant to the Declaratory Judgment Act and the Private Attorney General Doctrine;
5. Any further relief this Court deems just and appropriate.

Respectfully submitted this 23rd day of January, 2024.

/s/ Rylee Sommers-Flanagan
Rylee Sommers-Flanagan
MT Bar No. 42343246
Christopher Patalano
MT Bar No. 14146
Constance Van Kley
MT Bar No. 50475027
Upper Seven Law

Attorneys for Plaintiffs

/s/ Tal M. Goldin
Tal M. Goldin
Michelle L. Weltman
Disability Rights Montana

Attorneys for Disability Rights Montana

Exhibit A

Final Version of HB 393



AN ACT GENERALLY REVISING LAWS RELATED TO ESTABLISHING THE STUDENTS WITH SPECIAL NEEDS EQUAL OPPORTUNITY ACT AND THE MONTANA SPECIAL NEEDS EQUAL OPPORTUNITY EDUCATION SAVINGS ACCOUNT PROGRAM; ESTABLISHING REQUIREMENTS FOR ELIGIBILITY AND ALLOWABLE EXPENSES; PROVIDING RESPONSIBILITIES FOR PARENTS, SCHOOL DISTRICTS, AND THE SUPERINTENDENT OF PUBLIC INSTRUCTION; CLARIFYING THE AUTONOMY OF PARTICIPATING PRIVATE SCHOOLS; PROVIDING FOR FUNDING OF SPECIAL NEEDS EQUAL OPPORTUNITY EDUCATION SAVINGS ACCOUNTS; ESTABLISHING THE SPECIAL NEEDS EQUAL OPPORTUNITY EDUCATION SAVINGS TRUST; PROVIDING AN APPROPRIATION AND A STATUTORY APPROPRIATION; PROVIDING RULEMAKING AUTHORITY; PROVIDING DEFINITIONS; AMENDING SECTION 17-7-502, MCA; AND PROVIDING AN EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. [Sections 1 through 10] may be cited as the "Students with Special Needs Equal Opportunity Act".

Section 2. Montana special needs equal opportunity education savings account program -- findings and purposes. (1) There is a Montana special needs equal opportunity education savings account program 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.

(2) The legislature finds that expanding special needs educational opportunities within the state is a valid public purpose to ensure equal educational opportunity for all children with special needs.

(3) The purposes of [sections 1 through 10] pursuant to Article X, section 1(1), of the Montana constitution are to ensure that Montana children have access to educational opportunities that will develop each child's full educational potential.

Section 3. Definitions. As used in [sections 1 through 10], the following definitions apply:

- (1) "Eligible postsecondary institution" means an accredited postsecondary institution located in Montana.
- (2) "ESA student amount" means the sum of:
- (a) the data-for-achievement payment rate under 20-9-306;
 - (b) the Indian education for all payment rate under 20-9-306;
 - (c) the per-ANB amounts of the instructional block grant and related services block grant under 20-9-321; and
 - (d) the applicable per-ANB maximum rate established in 20-9-306 for the student multiplied by the ratio of adopted general fund budget to maximum general fund budget in the prior year, rounded to the nearest one hundredth and not to exceed 1.00, in the district in which the student is included for ANB purposes under the program.
- (3) "Montana special needs equal opportunity education savings account" or "account" means an account within the trust established in [section 10] in which a payment under [section 9] is deposited on behalf of a qualified student for the purpose of reimbursement for the purchase of allowable educational resources pursuant to [section 4] for qualified students.
- (4) "Parent" means a biological parent, adoptive parent, legal guardian, custodian, or other person with legal authority to act on behalf of a qualified student, and whose parental rights have not been terminated.
- (5) "Program" means the Montana special needs equal opportunity education savings account program established in [section 2].
- (6) "Qualified school" means a nonpublic school serving any combination of grades kindergarten through 12 that:
- (a) is in compliance with applicable local health and safety regulations;
 - (b) holds a valid occupancy permit, if required by the municipality;

(c) does not discriminate on the basis of race, creed, religion, sex, marital status, color, age, physical disability, or national origin or because of mental disability, unless based on reasonable grounds, pursuant to 49-2-307;

(d) requires that any employee who may have unsupervised access to children be subject to a criminal history background check prior to employment pursuant to and in support of 42 U.S.C. 5119(a) and (c); and

(e) meets the requirements for Montana nonpublic schools under 20-5-109.

(7) "Qualified student" means a resident of the state who:

(a) in the current school year:

(i) is identified as a "child with a disability" under the Individuals With Disabilities Education Act, 20 U.S.C. 1400, et seq.; and

(ii) is between the ages of 5 and 19 on September 10;

(b) is not currently enrolled in a school operating for the purpose of providing educational services to youth in department of corrections commitment programs or in the Montana school for the deaf and blind; and

(c) (i) was counted during the previous school year for purposes of school district ANB funding;

(ii) was enrolled during the previous school year in a program listed in subsection (7)(b);

(iii) did not reside in the state in the previous school year; or

(iv) is eligible to enter a kindergarten program pursuant to 20-7-117.

(8) "Resident school district" means the school district in which a student resides.

Section 4. Use of Montana special needs equal opportunity education savings account -- allowable educational resources. (1) The superintendent of public instruction shall allow money deposited in the Montana special needs equal opportunity education savings account to be used to reimburse parents for the purchase of the following educational resources only for the benefit of the individual for whom the account was created:

(a) qualified school tuition, fees, textbooks, software, or other instructional materials or services;

(b) an educational program or course using electronic or offsite delivery methods, including but not

limited to tutoring, distance learning programs, online programs, and technology delivered learning programs;

(c) curriculum, including supplemental materials necessary for the curriculum;

(d) tutoring;

(e) educational therapies or services, including but not limited to occupational, behavioral, physical, speech-language, and audiology therapies from licensed or certified practitioners or providers, including licensed or certified paraprofessionals or educational aides;

(f) state or nationally recognized assessment tests, advanced placement exams, entrance examinations at an eligible postsecondary institution, or other assessment instruments;

(g) services provided by a public school in the state, including individual classes and extracurricular activities;

(h) eligible postsecondary institution tuition, books, online courses, or other fees;

(i) no more than \$50 annually in consumable education supplies, such as paper, pens, and markers;

(j) transportation required for another allowable educational service;

(k) fees paid to a cooperative educational program; and

(l) any other educational expense approved by the superintendent of public instruction.

(2) Account funds may not be refunded, rebated, or shared with a parent or participating student in any manner.

(3) A parent may pay for educational services or costs not covered by account funds.

(4) Nothing in [sections 1 through 10] may be construed to require that a qualified student must be enrolled, full-time or part-time, in either a private school or nonpublic online school.

Section 5. Parent responsibilities. (1) In order for a qualified student to participate in the Montana special needs equal opportunity education savings account program during the time periods designated by the superintendent of public instruction pursuant to [section 6], the superintendent of public instruction shall require parents of qualified students who wish to participate in the program to notify the superintendent of public instruction and sign a contract with the superintendent of public instruction to do the following:

(a) utilize account funds to procure allowable educational resources under [section 4] to develop

the qualified student's full educational potential;

(b) release the resident school district from all obligations to educate the qualified student, including any requirements that the district provide a free and appropriate education to the qualified student or develop an individualized education program for the qualified student;

(c) submit to the superintendent of public instruction copies of receipts for allowable educational resources for reimbursement;

(d) if the qualified student is re-enrolled in a public school, immediately notify the superintendent of public instruction; and

(e) if the qualified student enrolls at a qualified school, ensure that the qualified student:

(i) remains in attendance unless excused by the qualified school for illness or other good cause;

and

(ii) complies with the qualified school's published policies.

(2) If a qualified student re-enrolls full-time in a public school district, the superintendent of public instruction shall terminate payments for the student to the Montana special needs equal opportunity education savings account.

Section 6. Responsibilities of superintendent of public instruction -- rulemaking. (1) The superintendent of public instruction shall make information about the program accessible through printed informational materials and the office of public instruction website to parents, students, and school districts.

(2) The superintendent of public instruction shall ensure that parents of qualified students receive notice that participation in the program is a parental placement under the Individuals With Disabilities Education Act, 20 U.S.C. 1412, along with an explanation of the rights that parentally placed students possess under the Individuals With Disabilities Education Act and any applicable state laws and regulations.

(3) The superintendent of public instruction may remove a qualified student from eligibility for an account if the parent fails to comply with the terms of the contract signed pursuant to [section 5], knowingly misuses account funds, or knowingly fails to comply with the terms of the contract with intent to defraud. If a qualified student is removed from eligibility, the superintendent of public instruction shall suspend the qualified student from the program and shall notify the parent in writing that the qualified student has been suspended

and that no further reimbursements from the account will be allowed. The notification must specify the reason for the suspension and state that the parent has 10 business days to respond and take corrective action. If the parent refuses or fails within the 10-day period to contact the superintendent of public instruction or provide information or make a report that is required for reinstatement, the superintendent of public instruction may remove the qualified student from the program pursuant to this subsection. A parent may appeal the superintendent of public instruction's decision pursuant to Title 2, chapter 4, part 6.

(4) The superintendent of public instruction may refer cases of substantial misuse of account funds to the attorney general for investigation if the superintendent of public instruction obtains evidence of fraudulent use of an account.

(5) The superintendent of public instruction shall establish rules necessary for administering the program that are limited to the following:

(a) establishment of no fewer than two time periods each year during which a student's parent may notify the superintendent of public instruction of the parent's desire for the student to participate in the program. Each time period must be at least 1 month long. One period must be between September 1 and January 1, and the other time period must be between March 1 and June 1, based on the superintendent of public instruction's determination of school district and parent needs.

(b) verification of student eligibility pursuant to [section 3];

(c) creation of a parent contract pursuant to [section 5];

(d) notification of the resident school district of the student's participation in the program;

(e) calculation of the amount of the ESA student amount;

(f) accounting guidance related to the money remitted by school districts under [section 9(2)];

(g) establishment of participation agreements to create a trust interest in the special needs equal opportunity education savings trust established in [section 10] and provision for participation in the program;

and

(h) procedures for reimbursement for the purchase of allowable educational resources from a student's account.

Section 7. Responsibilities of public school districts -- student records. A public school or

school district that previously enrolled a qualified student participating in the Montana special needs equal opportunity education savings account program shall provide a qualified school that has enrolled a participating student with a complete copy of the student's school records, while complying with the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g.

Section 8. Qualified schools -- regulations. (1) The superintendent of public instruction shall require qualified schools who enroll students who are participating in the Montana special needs equal opportunity education savings account program to submit quarterly reports of services provided to qualified students as required under the program.

(2) A qualified school is not an agent of the state or federal government.

(3) The superintendent of public instruction or any other state agency may not regulate the educational program of a qualified school that enrolls a qualified student, except as provided under 20-5-109.

(4) The creation of the Montana special needs equal opportunity education savings account program does not expand the regulatory authority of the state, its officers, or a school district to impose additional regulation on providers of educational services under the program beyond that reasonably necessary to enforce the requirements of the Montana special needs equal opportunity education savings account program.

Section 9. Montana special needs equal opportunity education savings account -- funding and administration. (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.

Section 10. Special needs equal opportunity education savings trust. There is a special needs equal opportunity education savings trust that is an instrumentality of the state and that is created for a public

purpose. The trust consists of participating trusts with each participating trust corresponding to an account. The assets of one participating trust may not be commingled with the assets of any other participating trust. The assets and earnings of any participating trust may not be used to satisfy the obligations of any other participating trust. Each participating trust account represents a trust interest in the trust and includes interest and investment income earned by the trust account.

Section 11. Section 17-7-502, MCA, is amended to read:

"17-7-502. Statutory appropriations -- definition -- requisites for validity. (1) A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the need for a biennial legislative appropriation or budget amendment.

(2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both of the following provisions:

(a) The law containing the statutory authority must be listed in subsection (3).

(b) The law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in this section.

(3) The following laws are the only laws containing statutory appropriations: 2-17-105; 5-11-120; 5-11-407; 5-13-403; 5-13-404; 7-4-2502; 7-4-2924; 7-32-236; 10-1-108; 10-1-1202; 10-1-1303; 10-2-603; 10-2-807; 10-3-203; 10-3-310; 10-3-312; 10-3-314; 10-3-802; 10-3-1304; 10-4-304; 10-4-310; 15-1-121; 15-1-218; 15-31-165; 15-31-1004; 15-31-1005; 15-35-108; 15-36-332; 15-37-117; 15-39-110; 15-65-121; 15-70-101; 15-70-130; 15-70-433; 16-11-119; 16-11-509; 17-3-106; 17-3-212; 17-3-222; 17-3-241; 17-6-101; 17-7-215; 18-11-112; 19-3-319; 19-3-320; 19-6-404; 19-6-410; 19-9-702; 19-13-604; 19-17-301; 19-18-512; 19-19-305; 19-19-506; 19-20-604; 19-20-607; 19-21-203; [section 9]; 20-8-107; 20-9-534; 20-9-622; [20-15-328]; 20-26-617; 20-26-1503; 22-1-327; 22-3-116; 22-3-117; [22-3-1004]; 23-4-105; 23-5-306; 23-5-409; 23-5-612; 23-7-301; 23-7-402; 30-10-1004; 37-43-204; 37-50-209; 37-54-113; 39-71-503; 41-5-2011; 42-2-105; 44-4-1101; 44-12-213; 44-13-102; 46-32-108; 50-1-115; 53-1-109; 53-6-148; 53-9-113; 53-24-108; 53-24-206; 60-5-530; 60-11-115; 61-3-321; 61-3-415; 67-1-309; 69-3-870; 69-4-527; 75-1-1101; 75-5-1108; 75-6-214; 75-11-313; 75-26-308; 76-13-150; 76-13-151; 76-13-417; 76-17-103; 77-1-108; 77-2-362; 80-2-222; 80-4-416; 80-11-518; 80-11-1006; 81-1-112; 81-1-113; 81-7-106; 81-7-123; 81-10-103; 82-11-161; 85-2-526; 85-20-1504; 85-20-1505; [85-25-

102]; 87-1-603; 87-5-909; 90-1-115; 90-1-205; 90-1-504; 90-6-331; and 90-9-306.

(4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations, as due, 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. (In subsection (3): pursuant to sec. 10, Ch. 360, L. 1999, the inclusion of 19-20-604 terminates contingently when the amortization period for the teachers' retirement system's unfunded liability is 10 years or less; pursuant to sec. 73, Ch. 44, L. 2007, the inclusion of 19-6-410 terminates contingently upon the death of the last recipient eligible under 19-6-709(2) for the supplemental benefit provided by 19-6-709; pursuant to sec. 5, Ch. 383, L. 2015, the inclusion of 85-25-102 is effective on occurrence of contingency; pursuant to sec. 6, Ch. 423, L. 2015, the inclusion of 22-3-116 and 22-3-117 terminates June 30, 2025; pursuant to sec. 12, Ch. 55, L. 2017, the inclusion of 37-54-113 terminates June 30, 2023; pursuant to sec. 4, Ch. 122, L. 2017, the inclusion of 10-3-1304 terminates September 30, 2025; pursuant to sec. 1, Ch. 213, L. 2017, the inclusion of 90-6-331 terminates June 30, 2027; pursuant to secs. 5, 8, Ch. 284, L. 2017, the inclusion of 81-1-112, 81-1-113, and 81-7-106 terminates June 30, 2023; pursuant to sec. 1, Ch. 340, L. 2017, the inclusion of 22-1-327 terminates July 1, 2023; pursuant to sec. 10, Ch. 374, L. 2017, the inclusion of 76-17-103 terminates June 30, 2027; pursuant to sec. 5, Ch. 50, L. 2019, the inclusion of 37-50-209 terminates September 30, 2023; pursuant to sec. 1, Ch. 408, L. 2019, the inclusion of 17-7-215 terminates June 30, 2029; pursuant to secs. 11, 12, and 14, Ch. 343, L. 2019, the inclusion of 15-35-108 terminates June 30, 2027; pursuant to sec. 7, Ch. 465, L. 2019, the inclusion of 85-2-526 terminates July 1, 2023; pursuant to sec. 5, Ch. 477, L. 2019, the inclusion of 10-3-802 terminates June 30, 2023; pursuant to secs. 1, 2, 3, Ch. 139, L. 2021, the inclusion of 53-9-113 terminates June 30, 2027; pursuant to sec. 8, Ch. 200, L. 2021, the inclusion of 10-4-310 terminates July 1, 2031; pursuant to secs. 3, 4, Ch. 404, L. 2021, the inclusion of 30-10-1004 terminates June 30, 2027; pursuant to sec. 5, Ch. 548, L. 2021, the inclusion of 50-1-115 terminates June 30, 2025; pursuant to secs. 5 and 12, Ch. 563, L. 2021, the inclusion of 22-3-1004 is effective July 1, 2027; and pursuant to sec. 15, Ch. 574, L. 2021, the inclusion of 46-32-108 terminates June 30, 2023.)"

Section 12. Appropriation. The following money is appropriated from the state general fund to the office of public instruction:

- (1) for fiscal year 2024, \$75,000 for the purpose of Montana special needs equal opportunity education savings account program administrative costs; and
- (2) for fiscal year 2025, \$30,000 for the purpose of Montana special needs equal opportunity education savings account program administrative costs.

Section 13. Transition. The legislature intends that this program be operational for the school year beginning July 1, 2024, and that the office of public instruction develop all necessary components of the program during the school year beginning July 1, 2023, to meet that intention.

Section 14. Codification instruction. [Sections 1 through 10] are intended to be codified as an integral part of Title 20, chapter 7, and the provisions of Title 20, chapter 7, apply to [sections 1 through 10].

Section 15. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 16. Effective date. [This act] is effective July 1, 2023.

- END -

I hereby certify that the within bill,
HB 393, originated in the House.

Chief Clerk of the House

Speaker of the House

Signed this _____ day
of _____, 2023.

President of the Senate

Signed this _____ day
of _____, 2023.

HOUSE BILL NO. 393

INTRODUCED BY S. VINTON, G. HERTZ, F. ANDERSON, B. LER, B. MITCHELL, L. REKSTEN, K.
SEEKINS-CROWE, M. BERTOGLIO, S. ESSMANN, M. YAKAWICH, L. DEMING, J. BERGSTROM

AN ACT GENERALLY REVISING LAWS RELATED TO ESTABLISHING THE STUDENTS WITH SPECIAL NEEDS EQUAL OPPORTUNITY ACT AND THE MONTANA SPECIAL NEEDS EQUAL OPPORTUNITY EDUCATION SAVINGS ACCOUNT PROGRAM; ESTABLISHING REQUIREMENTS FOR ELIGIBILITY AND ALLOWABLE EXPENSES; PROVIDING RESPONSIBILITIES FOR PARENTS, SCHOOL DISTRICTS, AND THE SUPERINTENDENT OF PUBLIC INSTRUCTION; CLARIFYING THE AUTONOMY OF PARTICIPATING PRIVATE SCHOOLS; PROVIDING FOR FUNDING OF SPECIAL NEEDS EQUAL OPPORTUNITY EDUCATION SAVINGS ACCOUNTS; ESTABLISHING THE SPECIAL NEEDS EQUAL OPPORTUNITY EDUCATION SAVINGS TRUST; PROVIDING AN APPROPRIATION AND A STATUTORY APPROPRIATION; PROVIDING RULEMAKING AUTHORITY; PROVIDING DEFINITIONS; AMENDING SECTION 17-7-502, MCA; AND PROVIDING AN EFFECTIVE DATE.

Exhibit B

Gov.'s Off. of Budget & Program
Planning, Fiscal Note 2025 Biennium:
HB0393 (Feb. 16, 2023)



GOVERNOR'S OFFICE OF
BUDGET AND PROGRAM PLANNING

Fiscal Note 2025 Biennium

Bill information:

HB0393 - Establish the Students with Special Needs Equal Opportunity Act (Vinton, Sue)

Status: As Introduced - Revised

- Significant Local Gov Impact
 Needs to be included in HB 2
 Technical Concerns
 Included in the Executive Budget
 Significant Long-Term Impacts
 Dedicated Revenue Form Attached

FISCAL SUMMARY

	<u>FY 2024</u> <u>Difference</u>	<u>FY 2025</u> <u>Difference</u>	<u>FY 2026</u> <u>Difference</u>	<u>FY 2027</u> <u>Difference</u>
Expenditures:				
General Fund	\$110,089	\$114,565	\$146,223	\$148,183
General Fund Appropriation	\$75,000	\$30,000	\$0	\$0
State Special Revenue	\$0	\$34,083	\$35,105	\$35,865
Trust Fund	\$0	\$647,579	\$666,987	\$681,441
Revenue:				
General Fund	\$0	\$0	\$0	\$0
General Fund Appropriation	\$0	\$0	\$0	\$0
State Special Revenue	\$0	\$34,083	\$35,105	\$35,865
Trust Fund	\$0	\$647,579	\$666,987	\$681,441
Net Impact-General Fund Balance:	<u>(\$185,089)</u>	<u>(\$114,565)</u>	<u>(\$146,223)</u>	<u>(\$148,183)</u>

Description of fiscal impact: HB 393 establishes a Montana special needs education savings account program, establishes requirements and responsibilities, and provides an appropriation for administration of the program of \$75,000 in FY 2024 and \$30,000 in FY 2025. State general fund support required for this program in addition to the appropriation is estimated to be \$110,089 in FY 2024 and \$114,565 in FY 2025.

FISCAL ANALYSIS

Assumptions:

- HB 393 establishes a special needs equal opportunity education savings account program for qualified students.

2. The definition of a “qualified student” is a student between the ages of 5 and 18 (inclusive) who was counted during the previous school year for ANB funding and is not currently enrolled in the Montana School for the Deaf and Blind or Pine Hills Correctional Facility or is eligible to enter a Montana state public school program. The student must also be identified as a student with a disability under the Individuals with Disabilities Education Act, 20 U.S.C. 1400, et seq.
3. HB 393 directs the Superintendent of Public Instruction to notify the resident district of the qualifying student the amount to be distributed by the resident district to the Montana special needs equal opportunity education savings account on behalf of the qualifying student.
4. To determine the Educational Savings Account (ESA) the amount is calculated as the sum of:
 - a. Data for achievement payment (Data) under 20-9-306, MCA;
 - b. Indian Education for All payment (IEA) under 20-9-306, MCA;
 - c. Per-ANB amounts of the instructional (IBG) and related services (RSBG) block grants under 20-9-321, MCA; and
 - d. Per-ANB entitlement amount under 20-9-306, MCA, multiplied by the ratio of school district adopted budget to district maximum general fund budget.
5. The ESA amount is estimated as follows:

Elementary Programs (all represent dollars)									
Fiscal Year	Data	IEA	140% IBG	140% RSBG	Per-ANB	Per-ANB Minimum	Per-ANB Maximum	ESA Amount Minimum	ESA Amount Maximum
FY2023	22.29	23.28	213.46	71.15	5,962.00	4,769.60	5,962.00	5,099.78	6,292.18
FY2024	22.89	23.91	215.89	71.96	6,123.00	4,898.40	6,123.00	5,233.05	6,457.65
FY2025	23.58	24.63	222.38	74.13	6,307.00	5,045.60	6,307.00	5,390.32	6,651.72
FY2026	24.29	25.37	229.05	76.36	6,496.00	5,196.80	6,496.00	5,551.87	6,851.07
FY2027	24.82	25.92	234.01	78.01	6,637.00	5,309.60	6,637.00	5,672.36	6,999.76

High School Programs (all represent dollars)									
Fiscal Year	Data	IEA	140% IBG	140% RSBG	Per-ANB	Per-ANB Minimum	Per-ANB Maximum	ESA Amount Minimum	ESA Amount Maximum
FY2023	22.29	23.28	213.46	71.15	7,634.00	6,107.20	7,634.00	6,437.38	7,964.18
FY2024	22.89	23.91	215.89	71.96	7,840.00	6,272.00	7,840.00	6,606.65	8,174.65
FY2025	23.58	24.63	222.38	74.13	8,075.00	6,460.00	8,075.00	6,804.72	8,419.72
FY2026	24.29	25.37	229.05	76.36	8,317.00	6,653.60	8,317.00	7,008.67	8,672.07
FY2027	24.82	25.92	234.01	78.01	8,497.00	6,797.60	8,497.00	7,160.36	8,859.76

6. For the purposes of this fiscal note, all estimates are calculated on the average of the minimum and maximum ESA amounts and an average is used between elementary and high school programs.
7. Based on the October 2022 official enrollment count, 21,127 students are identified as a student with disabilities attending 373 school districts and would qualify for the Montana special needs education savings account program.
8. The table below calculates the maximum amount that could be redirected from public schools to the Montana Special Needs Equal Opportunity Education Savings account program based on eligible students multiplied by the statewide average district student amount or district student amount.

FY 2024	FY 2025	FY 2026	FY 2027
\$139,818,571	\$144,014,646	\$148,330,977	\$151,545,196

9. If all 21,127 eligible students participated in the education savings account, the program would transfer approximately \$140 million annually of state funding and local property tax dollars from the local public-school districts to the education savings account. For purposes of this fiscal note, it is expected that not more than 100 students would participate in the education savings accounts program.
10. 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.
11. The OPI projects that beginning in FY 2025 approximately \$6,816.62 each year would be deposited for each student participating in the special education savings accounts created by HB 393
12. The following table represents the amount of funding anticipated to be received from school districts to OPI for program participation of 100 students. The private purpose trust funds would receive 95% and the special needs education savings account would receive 5%.

	FY 2024	FY 2025	FY 2026	FY 2027
Number of participants	0	100	100	100
Private Purpose (95%)	\$0	\$647,579	\$666,987	\$681,441
OPI Special Needs Ed Savings (5%)	\$0	\$34,083	\$35,105	\$35,865

13. Money deposited into a Montana Special Needs Education savings account may be used on behalf of a student for tuition, fees, software, instructional materials, and a wide range of both curricular and extracurricular services. The account can also be used to pay tuition, books, online courses, or other fees for postsecondary institutions.
14. The funds from the educational savings account may not be spent by the student for computer hardware, other technological devices, or transportation unless specific to the allowable costs outlined in section 5 of HB 393.
15. Education cooperative as used in HB 393 is assumed to be either a multi-district cooperative established under 20-3-363, MCA, or a full-service education cooperative established under 20-7-451, MCA.
16. Section 10 of HB 393 creates a special needs equal opportunity education savings trust fund that is to be an instrumentality of the state and created for a public purpose. The fund is to be used by OPI to develop a separate trust for each participating student.
17. HB 393, new Section 9(7), creates a special needs education savings account to be used to cover OPI administrative costs of the program. Five percent of the money transferred to OPI from the resident school districts would be deposited into the account and the account is statutorily appropriated in 17-7-502, MCA.
18. Under HB 393, a parent must notify the Superintendent of Public Instruction in the fall and again in the spring that their child would qualify for the education savings account. The parent signs the contract assurances listed in Section 4 of HB 393.
19. Each parent is required to submit to the Superintendent of Public Instruction copies of all expense receipts and account statements related to the savings account.
20. The Superintendent of Public Instruction must make information about the program available, conduct audits of accounts, remove parents who do not comply with the contract, and suspend accounts where applicable.
21. The Superintendent of Public Instruction is to collect quarterly reports of services provided to qualified students from qualified schools who enroll students participating in the Special Needs Equal Opportunity Education Savings Account Program.
22. The Superintendent of Public Instruction is required to establish rules necessary for administering the program and are limited to the following:
 - a. Establishment of no fewer than two time periods each year during which a student's parent may notify the superintendent of the parent's desire for the student to participate in the program. Each time period must be at least one month long. One period must be between September 1 and January 1, and the

other time period must be between March 1 and June 1, based on the superintendent's determination of district and parent needs.

- b. verification of student eligibility pursuant to [section 3];
 - c. creation of a parent contract pursuant to [section 5];
 - d. notification of the resident school district of the student's participation in the program;
 - e. calculation of the amount of the district student amount and the statewide average district student amount;
 - f. auditing of expenditures for allowable educational services from a student's account; and
 - g. auditing of payments received by qualified schools under the program.
23. The OPI would use the 2023-24 school year to develop and implement the education savings account program. There are many details related to managing these savings accounts, including consumer financial protections and disclosure regulations, which need to be researched. Application processes and procedures would need to be put in place.
24. HB 393 appropriates \$75,000 to the OPI for FY 2024 and \$30,000 for FY 2025 for program administrative purposes.
25. OPI expects it would need at least 2.00 FTE to include an Accountant 1 and an Accountant 3 for the legal, accounting, and financial skills to develop and operate this program at a cost of \$146,000 per year. The operating budget would be \$12,600 which includes a desk package of \$1,600 and a computer package of \$1,200 for each FTE one-time-only in FY 2024 and FY 2025 and beyond operating costs would be \$7,000. Indirect costs would total \$26,489 in FY 2024 and \$25,648 in FY 2025. Personal services and operating costs are inflated in FY 2026 and FY 2027 by 1.5% per year.
26. The program would have to include at least 548 students to participate in the program in future years to generate enough funding to cover the estimated costs of operating the program.
27. There is a legal review note with this bill.
28. HB 393, Section 9(7)(a) creates a “special needs equal opportunity ESA administration account” within the state special revenue fund. Section 9(7)(9)(b) states that the account is to be statutorily appropriated. The following table answers questions per 17-1-508(2), MCA.

	<u>YES</u>	<u>NO</u>
a. The money is from a continuing, reliable, and estimable source.	X	
b. The use of the appropriation or the expenditure occurrence is predictable and reliable.	X	
c. The authority exists elsewhere.		X
d. An alternative appropriation method is available, practical, or effective.	X	
e. It appropriates state general fund money for purposes other than paying for emergency services.		X
f. The money is used for general purposes.		X
g. The legislature wishes to review expenditure and appropriation levels each biennium.	X	
h. An expenditure cap and sunset date are excluded.	X	

	<u>FY 2024</u> <u>Difference</u>	<u>FY 2025</u> <u>Difference</u>	<u>FY 2026</u> <u>Difference</u>	<u>FY 2027</u> <u>Difference</u>
<u>Fiscal Impact:</u>				
FTE	2.00	2.00	2.00	2.00
<u>Expenditures:</u>				
Personal Services	\$146,000	\$146,000	\$148,190	\$150,413
Operating Expenses	\$39,089	\$32,648	\$33,138	\$33,635
Student Assistance	\$0	\$647,579	\$666,987	\$681,441
TOTAL Expenditures	<u>\$185,089</u>	<u>\$826,227</u>	<u>\$848,315</u>	<u>\$865,489</u>
<u>Funding of Expenditures:</u>				
General Fund (01)	\$110,089	\$114,565	\$146,223	\$148,183
General Fund (01) Appropriation	\$75,000	\$30,000	\$0	\$0
State Special Revenue (02)	\$0	\$34,083	\$35,105	\$35,865
Trust Fund (09)	\$0	\$647,579	\$666,987	\$681,441
TOTAL Funding of Exp.	<u>\$185,089</u>	<u>\$826,227</u>	<u>\$848,315</u>	<u>\$865,489</u>
<u>Revenues:</u>				
General Fund (01)	\$0	\$0	\$0	\$0
General Fund (01) Appropriation	\$0	\$0	\$0	\$0
State Special Revenue (02)	\$0	\$34,083	\$35,105	\$35,865
Trust Fund (09)	\$0	\$647,579	\$666,987	\$681,441
	<u>\$0</u>	<u>\$681,662</u>	<u>\$702,092</u>	<u>\$717,306</u>
<u>Net Impact to Fund Balance (Revenue minus Funding of Expenditures):</u>				
General Fund (01)	(\$110,089)	(\$114,565)	(\$146,223)	(\$148,183)
General Fund (01) Appropriation	(\$75,000)	(\$30,000)	\$0	\$0
State Special Revenue (02)	\$0	\$0	\$0	\$0
Trust Fund (09)	\$0	\$0	\$0	\$0

Effect on County or Other Local Revenues or Expenditures:


1. School districts may adopt higher general fund budgets to offset the loss of funds related to this bill and therefore, local property taxes could increase.
2. The difference in the potential increase needed to provide for the qualified schools could be greater than the potential schools could vote property tax increases to offset the loss leading to potential budget shortfalls. (Approximately 90% of expenditures go to teacher pay and the cost is the same with nine or ten students in the classroom).
3. For every student in this program, a resident district would be required to contribute \$6,816.62 to the special needs education savings account. This funding would not be budgeted and would reduce funding for other instruction-related expenditures. If all 21,127 eligible students participated in the education savings account, the program would transfer approximately \$140 million annually of state funding and local property tax dollars to the education savings account.

Technical Notes:

1. Article X, section 6 of the Montana Constitution prohibits aid to sectarian schools. Specifically, “The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary

or scientific institution, controlled in whole or in part by any church, sect, or denomination.” HB 393 may violate this section of the Montana Constitution.

2. The earliest that the program would become operational is the 2024-25 school year.
3. HB 393 recognizes a parent can revoke consent for Special Education & Related Services. ARM 10.16.3505A and 34 CFR 300.300(b)(4).
4. Section 3(7)(c) states that to qualify for an education savings account, a student must have been counted in the prior year for purposes of school district ANB funding. Language is needed for HB 393 to indicate the amount of the education savings account payment allocated to a student who was enrolled on a part-time basis.
5. The district student amount and the statewide average district student amount are not finalized until early November. Payment from school districts would be estimates in August through October.
6. Section 4(1)(k) makes payments to a cooperative educational program an allowable expense of the program. In Montana this is not possible for public school special education cooperatives. A school district may contract with other school districts to form a cooperative. Elementary and high school districts are defined in 20-6-101, MCA. This does not appear to allow a private school or other entity to enter into a cooperative agreement to provide educational services.
7. ANB generated from the prior year due to public school enrollment will follow the child. In order for a student to be “parentally placed” in a private school, the student cannot be enrolled in the public school district. Under 20-9-311, MCA, ANB is based on enrollment counts taken twice a year. If a student is not enrolled, they would not be counted, and the district would not receive funding for that student.

<u>REV</u>	<u>02/17/23</u>	<u></u>	<u>2-16-23</u>
<i>Sponsor's Initials</i>	<i>Date</i>	<i>Budget Director's Initials</i>	<i>Date</i>

- a) **Are there persons or entities that benefit from this dedicated revenue that do not pay? (please explain)**

Yes, school districts pay into the account from the district general fund which is funded with state and local monies. The Office of Public Instruction administrative costs are paid from the fund for administration of the Montana special needs equal opportunity education savings account program.

- b) **What special information or other advantages exist as a result of using a state special revenue fund that could not be obtained if the revenue were allocated to the general fund?**

The revenue is segregated for a specific purpose.

- c) **Is the source of revenue relevant to current use of the funds and adequate to fund the program activity that is intended? Yes / No (if no, explain)**

There are no current state funds being used for this purpose. The funds will be paid by K-12 public school districts to administer the program in HB 393.

- d) **Does the need for this state special revenue provision still exist? Yes No (Explain)**

Yes, this is dedicated to the purposes of the Montana special needs equal opportunity education savings account program and administration of the funds.

- e) **Does the dedicated revenue affect the legislature's ability to scrutinize budgets, control expenditures, or establish priorities for state spending? (Please Explain)**

No, the state special revenue will be accounted for in the SABHRS, state accounting system.

- f) **Does the dedicated revenue fulfill a continuing, legislatively recognized need? (Please Explain)**

Yes, the revenue is derived from legislative policy to provide additional state support for education.

- g) **How does the dedicated revenue provision result in accounting/auditing efficiencies or inefficiencies in your agency? (Please Explain. Also, if the program/activity were general funded, could you adequately account for the program/activity?)**

Use of a new fund ensures that cash is deposited and available before expenses are incurred. Expenditure tracking and analysis is more efficient when they are isolated in a specific fund.