Regular education children assist in these programs and accomplishments such as Thomas Fitzwater’s Support One Student initiative, a child advocacy program to assist at-risk students. Each identified student is matched with a volunteer staff member. These members include professional, custodial, secretarial, and cafeteria staff. Regular personal contact by caring and supportive staff member promotes a positive environment and guides the student away from inappropriate and possibly destructive behavior. Another example of Thomas Fitzwater’s inclusive policies is the collaboration between the Montgomery County Intermediate Unit special education classes and the regular education classes in our school. Throughout the county, the Intermediate Unit provides classes for children with low-incidence handicaps. Four of these classes are housed in Thomas Fitzwater’s school building. Regular education children assist in these classes and are very sensitive to these exceptional children’s needs. As a result of this collaboration, many special education students have been integrated into regular education classes. McKinley also began this year with its motto, “Success for All Students.” And every school in the community should endeavor to meet this standard.

Mr. Speaker, while I am glad Congress extended the demonstration authority for the CNO projects last session, I am disappointed that the Health Care Financing Administration is so anxious to terminate this important and effective program. In 1996, HCFA extended the demonstration for one year to allow them to better evaluate the costs or savings of the services provided under the program, learn more about the benefits or barriers of a particular program to participate care, review Medicare payments for out-of-plan services covered in a capitation rate, and provide greater opportunity for beneficiaries to participate in these programs.

Mr. KINGSTON. Mr. Speaker, the volunteer efforts of so many people in Offerman have been so extraordinary that one is tempted to suggest that the federal government consider this method of putting up new buildings in order to save ourselves from the cost overruns, delays, and problems that seem to plague this kind of enterprise all too often.

The efforts of people like the Edward Daniel family, Mrs. Lucille Chancey, Mrs. Ethel Roberson, the Sam Cason family, the Ray Cason family, the Harvey Dixon family, the Ellis Denison family, and so many, many others have been so inspiring that the entire community has created a feeling of togetherness that is similar to the feeling one experiences at a family reunion. And speaking of families, the extended Cason family contributed to the enterprise in a way that brought generations together.
INTRODUCTION OF THE FAIR ACCESS TO INDEMNITY AND REIMBURSEMENT (FAIR) ACT

HON. WILLIAM F. GOODLING
OF PENNSYLVANIA
IN THE HOUSE OF REPRESENTATIVES

Thursday, May 27, 1999

Mr. GOODLING. Mr. Speaker, I rise today to introduce a bill that will level the playing field for small businesses as they face two aggressive federal agencies with vast expertise—Labor Relations Board (NLRB) and the Occupational Safety and Health Administration (OSHA)—in their quest to enforce the Fair Access to Indemnity and Reimbursement Act (FAIR Act)—is about being fair to small businesses. It is about giving small entities, including labor organizations, the incentive they need to fight meritless claims brought against them by intimidating bureaucracies that sometimes strong-arm those having limited resources to defend themselves.

The FAIR Act is similar to Title IV of my Fairness for Small Business and Employees Act from last Congress, H.R. 3246, which passed the House last March. This new legislation, however, amends both the National Labor Relations Act (NLRA) and the Occupational Safety and Health Act (OSHA) to provide that a small business or labor organization which prevails in an action against the Board or OSHA will automatically be allowed to recoup the attorney's fees it spent defending itself. The FAIR Act applies to any employer who has not more than 100 employees and a net worth of not more than $7 million. It is these small entities that are most in need of the FAIR Act's protection.

Mr. Speaker, the FAIR Act ensures that those with modest means will not be forced to capitulate in the face of frivolous actions brought by the Board or OSHA, while making those agencies' bureaucrats think long and hard before they start an action against a small business. By granting attorney's fees and expenses to small businesses who know the case against them is a loser, who know that they have done nothing wrong, the FAIR Act gives these entities an effective means to fight against abusive and unwarranted intrusions by the Board and OSHA. Government agencies, the NLRB and OSHA—well-staffed, with numerous lawyers—should more carefully evaluate the merits of a case before bringing a complaint or citation against a small business, which is ill-equipped to defend itself against an opponent with such superior resources. The FAIR Act will provide protection for an employer who feels strongly that its case merits full consideration. It will ensure the fair presentation of the issues.

The FAIR Act says to these two agencies that if they bring a case against a “little guy” they had better make sure the case is a winner, because if the Board or OSHA loses, if it puts the small entity through the time, expense and hardship of an action only to have the business or labor organization come out a winner in the end, the Board or OSHA will have to reimburse the employer for its attorney's fees and expenses.

The FAIR Act's 100-employee eligibility limit represents a mere 20 percent of the 500-employee limit that is in the Equal Access to Justice Act (EAJA)—an Act passed in 1980 with strong bipartisan support to level the playing field for small businesses by awarding fees and expenses to parties prevailing against agencies. Under the EAJA, however, the Board or OSHA generally if it loses its case—is able to escape paying fees and expenses to the winning party if the agency can show it was “substantially justified” in bringing the action.

When the EAJA was made permanent law in 1985, the Congress made it clear in committee report language that federal agencies—both Labor and OSHA—too must be held accountable to the American people to ensure that they do not abuse their power to escape paying fees and expenses to winning parties. Congress said that for an agency to be considered “substantially justified” it must have more than a “reasonable basis” for bringing the action. Unfortunately, however, courts have unduly narrowed the definition of “reasonable basis” from Congress and have interpreted “substantially justified” to mean that an agency does not have to reimburse the winner if it had any “reasonable basis in law or fact” for bringing the action. The result of all this is that an agency easily is able to win an EAJA claim and the prevailing business is often left high and dry. Even though the employer wins its case against the Board or OSHA, the agency can still avoid paying fees and expenses under the EAJA if it meets this lower burden. This low threshold has led to egregious cases in which the employer has won its case—but even where the NLRB, for example, has withdrawn its complaint after forcing the employer to endure a costly trial or changed its legal theory in the middle of its case—and the employer has lost its follow-up EAJA claim for fees and expenses.

Since a prevailing employer faces such a difficult task when attempting to recover fees under the EAJA, very few even try to recover. For example, Mr. Speaker, in Fiscal Year 1998, the NLRB received only eight EAJA fee applications, and awarded fees to a single applicant—for a little more than $11,000. Indeed, during the ten-year period from FY 1987 to FY 1996, the NLRB received a grand total of 100 applications for fees. This small number of EAJA applications and awards arises in an overall context of thousands of cases each year. In Fiscal Year 1996 alone, for example, the NLRB received nearly 33,000 unfair labor practice charges and issued more than 2,500 complaints, 2,204 of them settled at some point post-complaint. Similarly, at the OSHRC, for the thirteen fiscal years 1982 to 1994, only 79 EAJA applications were filed with 38 granted some relief. To put these numbers into context, of nearly 77,000 OSHA violations cited in Fiscal Year 1998, some 2,061 inspections resulting in citations were contested.

Since it is clear the EAJA is underutilized at best, and at worst simply not working, the FAIR Act imposes a flat rule: If you are a small business, or a small labor organization, and you prevail against the Board or OSHA, then you will automatically get your attorney's fees and expenses. The FAIR Act adds new sections to the National Labor Relations Act and the Occupational Safety and Health Act. The new language simply states that a business or labor organization which has not more than 100 employees and a net worth of not more than $7 million is a “prevailing party” against the NLRB or the OSHRC in administrative proceedings “shall be” awarded fees as a prevailing party under the EAJA “without regard to whether the position of the United States was substantially justified.”

The FAIR Act awards fees and expenses “in accordance with the provisions” of the EAJA and would thus require a party to file a