DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2039/1dn
MES:sac:rs

April 2, 2013

Representative Kaufert:

This drafter's note is meant to alert you that, should this bill become law, it could be challenged as possibly violating the Establishment Clauses of the U.S. Constitution and the related provisions of the Wisconsin Constitution even though it is available to parents of children who attend both public and private schools. Opponents of the bill could argue that, because the bill may make it easier for pupils to attend a school at which the teaching of religious tenets, doctrines, or worship occurs, the primary effect of the bill is to benefit parochial schools in violation of the Establishment Clause.

In the case of *Mueller v. Allen*, 463 U.S. 388, 103 S. Ct. 3062 (1983), the U.S. Supreme Court upheld a Minnesota statute that allows taxpayers to deduct from their gross annual income expenses incurred, up to a certain level, for "tuition, textbooks and transportation" for their children in public or private elementary or secondary school.

Although an argument can be made that *Mueller* would apply to the tax credit created in this bill, you should be aware that the *Mueller* case was a close decision approved by a 5 to 4 majority. As the dissent in *Mueller* points out, starting at 463 U.S. 404 and 103 S. Ct. 3072, the majority decision seems to fly in the face of a long series of Supreme Court decisions, such as *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2955 (1973), *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), and *Sloan v. Lemon*, 413 U.S. 825, 93 S. Ct. 2982 (1973), which were all decided by much stronger majorities.

Under *Mueller*, however, supporters of this bill could argue that the bill is constitutional for several reasons. First, it evinces a proper and secular legislative purpose in creating an educated populace. Second, the Establishment Clause is not violated because the assistance is provided to the taxpayer and not to the school itself. *Mueller* at 399 and 103 S. Ct. at 3069.

Opponents of the bill could also make several strong arguments against the bill's constitutionality. First, they could argue that although the credit in this bill is technically available to the parents of children who attend either public or sectarian or nonsectarian private and charter schools, the $3,000 per pupil state aid or property tax revenue limit means that most of the benefit will go to the parents of children who attend private sectarian schools. Therefore, opponents of the bill could argue that the bill *does* have the "primary effect of advancing the sectarian aims of the nonpublic schools." See *Mueller* at 396 and 103 S. Ct. at 3067 (citations omitted).

On the other hand, just two years after *Mueller* was decided, the Supreme Court noted the significance of the fact that the Minnesota law applied to parents whose children attended both public and private schools. See *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 396. In fact, the *Mueller* majority itself thought that this fact was an important distinction between the Minnesota law and the law that was found unconstitutional in *Nyquist*. See *Mueller* at 398–399.

Second, opponents of the bill could argue, a court will not necessarily accept the legislature's claim that the bill has a secular or public purpose, *State ex. rel. Warren v. Reuter*, 44 Wis. 2d 201, 212 (1969), and that "the propriety of a legislature's purposes may not immunize from further scrutiny a law which ... has a primary effect that advances religion," *Nyquist* at 774, 93 S. Ct. at 2966.

Third, *Nyquist* and *Kurtzman* forbid any direct or indirect subsidy of religious education through any sort of a tax credit, subsidy, or deduction and, opponents could argue, the "primary effect" of this bill is to do precisely that, at least indirectly. See *Nyquist* at 783, 786, 789–791, 793, and 794, and 93 S. Ct. at 2971 to 2974 and 2976, *Kurtzman* at 613 and 625, and 91 S. Ct. at 2111 and 2117. Opponents could cite one of the reasons the Supreme Court struck down the New York law at issue in *Nyquist:* there was an "...absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes..."

Even if an effective means exists to guarantee that no public money is used to teach religious doctrines, opponents of the bill could argue that it still runs afoul of *Nyquist* by claiming that the bill provides an indirect subsidy to religious education merely by making attendance at religiously affiliated institutions more affordable. "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion–oriented schools." *Nyquist* at 784.

In addition, it could be argued by opponents of the bill that it violates the Wisconsin Constitution because art. I, sec. 18, is more prohibitive than the religion clauses in the federal constitution, *Reuter* at 227 and 58 Opinion of the Attorney General 163, 167 (1969). Although the Wisconsin Supreme Court believes that the federal Establishment Clause should be used as a guide to interpret art. I, sec. 18, of the state constitution (see *King v. Village of Waunakee*, 185 Wis. 2d 25, 54–55 (1994) and *Jackson v. Benson*, 218 Wis. 2d 835, 876–878 (1998)), the Court has also reaffirmed its prior decisions stating that "the Wisconsin Constitution [provides] stronger protection of religious freedom than that envisioned in the federal constitution." *State v. Miller*, 202 Wis. 2d 56, 64 (1996).

This is a very complex issue and, in light of the conflicting precedents that exist in this area of constitutional law, it is impossible to determine whether this bill would withstand a constitutional challenge. I believe, however, that a summary of the various arguments involved should be brought to your attention.

If you have any further questions about these issues, please don't hesitate to contact me.

Marc E. Shovers
Managing Attorney
Phone: (608) 266–0129
E–mail: marc.shovers@legis.wisconsin.gov