

**2013 DRAFTING REQUEST**

**Bill**

Received: **4/1/2013** Received By: **mshovers**  
 Wanted: **As time permits** Same as LRB:  
 For: **Dean Kaufert (608) 266-5719** By/Representing: **Rachel, Sen. Grothman**  
 May Contact: Drafter: **mshovers**  
 Subject: **Tax, Individual - income credit** Addl. Drafters:  
 Extra Copies:

Submit via email: **YES**  
 Requester's email: **Rep.Kaufert@legis.wisconsin.gov**  
 Carbon copy (CC) to:

**Pre Topic:**

No specific pre topic given

**Topic:**

Refundable individual income tax credit for certain public and private school tuition expenses

**Instructions:**

Assembly companion for LRB -2034/1. Create a refundable credit for K-12 tuition only, for certain public and nonpublic and charter schools. Credit is phased in from 2014 to 2022. Pupil must be dependent child of claimant

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	mshovers 4/1/2013	scalvin 4/2/2013	rschluet 4/2/2013	_____			
/1				_____	sbasford 4/2/2013	sbasford 4/30/2013	State S&L

FE Sent For:

→ At Intro.

<END>

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/?	mshovers	1/1 SAC 04/02/2013		_____	_____		

FE Sent For:

<END>

**Shovers, Marc**

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**From:** VerVelde, Rachel  
**Sent:** Monday, April 01, 2013 6:05 PM  
**To:** Shovers, Marc  
**Subject:** LRB -2034/1

Marc,

Could you send an Assembly companion for LRB 2034/1 to Representative Kaufert?

Thanks!

*Rachel A. VerVelde*

Office of Senator Glenn Grothman

[Rachel.VerVelde@legis.wi.gov](mailto:Rachel.VerVelde@legis.wi.gov)

O: 608-266-7513



State of Wisconsin  
2013 - 2014 LEGISLATURE

2039/1  
LRB 2034/1  
MES:sac:jmf  
Stays  
RMNR

2013 BILL

D-NOT!  
LPS: this is a companion bill.

*[Handwritten initials]*

1 AN ACT to amend 71.08 (1) (intro.) and 71.10 (4) (i); and to create 20.835 (2) (cb)  
2 and 71.07 (8m) of the statutes; relating to: creating a refundable individual  
3 income tax credit for tuition expenses paid for dependents who attend certain  
4 public and private elementary and secondary schools.

**Analysis by the Legislative Reference Bureau**

This bill creates a refundable individual income tax credit for amounts spent by a claimant on tuition for educational expenses, in the year to which the claim relates, for the claimant's dependent children to attend any public or private elementary or secondary school that does not receive more than \$3,000 in state aid or property tax revenue, per pupil, for the school year that ends in the taxable year to which the claim relates. Because the credit is refundable, if the amount of the credit for which the claimant is eligible exceeds his or her tax liability, the difference will be refunded to the claimant by check.

The maximum credit that may be claimed under the bill per year, per child, if the claimant files as a single individual or head of household, or if the claimant is a married person filing a joint return, is phased in from 2014 to 2019. Under the bill, for taxable year 2014, the maximum credit that may be claimed is \$1,000 for an elementary pupil (a pupil in kindergarten or grades one to eight) and \$1,500 for a secondary pupil (a pupil in grades nine to twelve); in 2015, \$1,100 for an elementary pupil and \$1,700 for a secondary pupil; in 2016, \$1,200 for elementary and \$1,900 for secondary; in 2017, \$1,300 for elementary and \$2,100 for secondary; for 2018, \$1,400 for elementary and \$2,300 for secondary; for 2019 and thereafter, \$1,500 for

**BILL**

elementary and \$2,500 for secondary. The maximum credit that may be claimed by a married person filing a separate return per year, per child, is 50 percent of the amount that may be claimed by a married joint filer. The amount of credit that may be claimed by a nonresident or part-year resident of this state is modified based on the ratio of the claimant's Wisconsin adjusted gross income (AGI) to his or her federal AGI. If a pupil is an elementary and a secondary pupil in the same year, the claimant may claim the credit for that pupil for only one grade.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 20.835 (2) (cb) of the statutes is created to read:

2           20.835 (2) (cb) *Education expenses credit.* A sum sufficient to pay the claims  
3 approved under s. 71.07 (8m).

4           **SECTION 2.** 71.07 (8m) of the statutes is created to read:

5           71.07 (8m) EDUCATION EXPENSES CREDIT. (a) *Definitions.* In this subsection:

6           1. "Claimant" means an individual who claims a pupil as a dependent under  
7 section 151 (c) of the Internal Revenue Code, on his or her tax return.

8           2. "Elementary pupil" means an individual who is enrolled in grades  
9 kindergarten to 8 at an eligible institution and who is a dependent of the claimant  
10 under section 151 (c) of the Internal Revenue Code.

11           3. "Eligible institution" means any public or private elementary or secondary  
12 school, including a charter school, that does not receive more than \$3,000 in state aid  
13 or property tax revenue, per pupil, for the school year that ends in the taxable year  
14 to which the claim relates.

15           4. "Pupil" means an elementary pupil or secondary pupil.

**BILL**

1           5. “Secondary pupil” means an individual who is enrolled in grades 9 to 12 at  
2 an eligible institution and who is a dependent of the claimant under section 151 (c)  
3 of the Internal Revenue Code.

4           6. “Tuition” means any amount paid by a claimant, in the year to which the  
5 claim relates, for a pupil’s tuition, for educational expenses, to attend an eligible  
6 institution.

7           (b) *Filing claims.* Subject to the limitations provided in this subsection, a  
8 claimant may claim as a credit against the tax imposed under s. 71.02 or 71.08, one  
9 of the following amounts paid for tuition in the year to which the claim relates, and  
10 if the allowable amount of the claim exceeds the income taxes otherwise due on the  
11 claimant’s income, the amount of the claim not used as an offset against those taxes  
12 shall be certified by the department of revenue to the department of administration  
13 for payment to the claimant by check, share draft, or other draft drawn from the  
14 appropriation account under s. 20.835 (2) (cb):

15           1. For taxable years beginning after December 31, 2013, and before January  
16 1, 2015, for an elementary pupil, \$1,000 and for a secondary pupil, \$1,500.

17           2. For taxable years beginning after December 31, 2014, and before January  
18 1, 2016, for an elementary pupil, \$1,100 and for a secondary pupil, \$1,700.

19           3. For taxable years beginning after December 31, 2015, and before January  
20 1, 2017, for an elementary pupil, \$1,200 and for a secondary pupil, \$1,900.

21           4. For taxable years beginning after December 31, 2016, and before January  
22 1, 2018, for an elementary pupil, \$1,300 and for a secondary pupil, \$2,100.

23           5. For taxable years beginning after December 31, 2017, and before January  
24 1, 2019, for an elementary pupil \$1,400 and for a secondary pupil, \$2,300.

**BILL**

1           6. For taxable years beginning after December 31, 2018, for an elementary  
2 pupil, \$1,500 and for a secondary pupil, \$2,500.

3           (c) *Limitations.* 1. Subject to subd. 4., the maximum credit that may be claimed  
4 under this subsection by a claimant who files as a single individual or head of  
5 household is the amount specified in one of the subdivisions under par. (b), for each  
6 elementary pupil or secondary pupil, in each year to which the claim relates. If an  
7 individual is an elementary pupil and a secondary pupil in the same taxable year, the  
8 claimant may claim the credit for only one grade for that pupil for that taxable year.

9           2. Subject to subd. 4., the maximum credit that may be claimed under this  
10 subsection by claimants who are a married couple and file a joint return is the  
11 amount specified one of the subdivisions under in par. (b), for each elementary pupil  
12 or secondary pupil, in each year to which the claim relates. If an individual is an  
13 elementary pupil and a secondary pupil in the same taxable year, the claimant may  
14 claim the credit for only one grade for that pupil for that taxable year.

15           3. Subject to subd. 4., the maximum credit that may be claimed by each spouse  
16 of a married couple that files separately is 50 percent of the amount described in  
17 subd. 2.

18           4. If a part-year resident or a nonresident of this state files a claim under this  
19 subsection, the maximum credit amount in subd. 1., 2., or 3. shall be multiplied by  
20 a fraction, the numerator of which is the individual's and his or her spouse's  
21 Wisconsin adjusted gross income and the denominator of which is the individual's  
22 and his or her spouse's federal adjusted gross income. In this subdivision, for  
23 married persons filing separately "adjusted gross income" means the separate  
24 adjusted gross income of each spouse, and for married persons filing jointly "adjusted  
25 gross income" means the total adjusted gross income of both spouses.

**BILL**

1           5. No credit may be allowed under this subsection unless it is claimed within  
2 the time period under s. 71.75 (2).

3           6. No credit may be allowed under this subsection for a taxable year covering  
4 a period of less than 12 months, except for a taxable year closed by reason of the death  
5 of the taxpayer.

6           (d) *Administration.* Subsection (9e) (d), to the extent that it applies to the credit  
7 under that subsection, applies to the credit under this subsection.

8           **SECTION 3.** 71.08 (1) (intro.) of the statutes is amended to read:

9           71.08 (1) IMPOSITION. (intro.) If the tax imposed on a natural person, married  
10 couple filing jointly, trust, or estate under s. 71.02, not considering the credits under  
11 ss. 71.07 (1), (2dd), (2de), (2di), (2dj), (2dL), (2dr), (2ds), (2dx), (2dy), (3m), (3n), (3p),  
12 (3q), (3r), (3rm), (3rn), (3s), (3t), (3w), (5b), (5d), (5e), (5f), (5h), (5i), (5j), (6), (6e), (8m),  
13 (8r), and (9e), 71.28 (1dd), (1de), (1di), (1dj), (1dL), (1ds), (1dx), (1dy), (2m), (3), (3n),  
14 (3t), and (3w), 71.47 (1dd), (1de), (1di), (1dj), (1dL), (1ds), (1dx), (1dy), (2m), (3), (3n),  
15 (3t), and (3w), 71.57 to 71.61, and 71.613 and subch. VIII and payments to other  
16 states under s. 71.07 (7), is less than the tax under this section, there is imposed on  
17 that natural person, married couple filing jointly, trust or estate, instead of the tax  
18 under s. 71.02, an alternative minimum tax computed as follows:

19           **SECTION 4.** 71.10 (4) (i) of the statutes is amended to read:

20           71.10 (4) (i) The total of claim of right credit under s. 71.07 (1), farmland  
21 preservation credit under ss. 71.57 to 71.61, farmland preservation credit, 2010 and  
22 beyond under s. 71.613, homestead credit under subch. VIII, farmland tax relief  
23 credit under s. 71.07 (3m), dairy manufacturing facility investment credit under s.  
24 71.07 (3p), jobs tax credit under s. 71.07 (3q), meat processing facility investment  
25 credit under s. 71.07 (3r), woody biomass harvesting and processing credit under s.

**BILL**

1 71.07 (3rm), food processing plant and food warehouse investment credit under s.  
2 71.07 (3rn), film production services credit under s. 71.07 (5f), film production  
3 company investment credit under s. 71.07 (5h), education expenses credit under s.  
4 71.07 (8m), veterans and surviving spouses property tax credit under s. 71.07 (6e),  
5 enterprise zone jobs credit under s. 71.07 (3w), beginning farmer and farm asset  
6 owner tax credit under s. 71.07 (8r), earned income tax credit under s. 71.07 (9e),  
7 estimated tax payments under s. 71.09, and taxes withheld under subch. X.

8

(END)

*D-Noted*

DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

- 2039/1/14  
LRB-2034/dn  
MES:sac:im  
stays

April 1, 2013

- date -

~~Senator Grothman~~ 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 Clause 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](mailto:marc.shovers@legis.wisconsin.gov)

**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.

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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).

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

**Basford, Sarah**

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**From:** Rep.Kaufert  
**Sent:** Monday, April 29, 2013 5:14 PM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB -2039/1 Topic: Refundable individual income tax credit for certain public and private school tuition expenses

Please Jacket LRB -2039/1 for the ASSEMBLY.