

**2013 DRAFTING REQUEST**

**Bill**

Received: **3/21/2014** Received By: **mshovers**  
 Wanted: **As time permits** Same as LRB: **-3475**  
 For: **Dean Kaufert (608) 266-5719** By/Representing: **Adam**  
 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:**

Create a refundable individual income tax credit for private school tuition

**Instructions:**

See attached. Repeal the priv. school tuition tax deduction created in the budget and replace it with a refundable credit.

**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> |
|--------------|-----------------------|----------------------|-----------------------|----------------|----------------------|----------------------|-----------------|
| /1           | mshovers<br>3/25/2014 | scalvin<br>3/28/2014 | jfrantze<br>3/28/2014 | _____          | lparisi<br>3/28/2014 | lparisi<br>3/31/2014 | State<br>S&L    |

FE Sent For:

<END>

*INTRO*

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/1 mshovers

1 SAC  
03/28/2014

  
3/28

State  
S&L

1 MES 3/21/14

FE Sent For:

<END>

## Shovers, Marc

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**From:** Field, Adam  
**Sent:** Friday, March 21, 2014 12:25 PM  
**To:** Shovers, Marc  
**Subject:** Assembly Companion to LRB 3475

Hi Marc,

Could we get an Assembly companion draft of Senator Grothman's LRB 3475 Re: creating a refundable individual income tax credit for tuition expense paid for dependents who attend certain private elementary and secondary schools.



13-3475\_1.pdf

Thanks,  
Adam

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**Adam R. Field**

Office of Rep. Dean Kaufert  
Wisconsin State Assembly



State of Wisconsin  
2013 - 2014 LEGISLATURE

4419/1  
LRB-3475/1  
MES:sac:s  
stays  
RMAR

2013 BILL

SAV  
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D-note

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gen

1 AN ACT *to repeal* 71.05 (6) (b) 49.; *to amend* 71.08 (1) (intro.) and 71.10 (4) (i);  
2 and *to create* 20.835 (2) (cb) and 71.07 (8m) of the statutes; **relating to:**  
3 creating a refundable individual income tax credit for tuition expenses paid for  
4 dependents who attend certain private elementary and secondary schools.

and  
charter  
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 an eligible institution, which is defined as any private elementary or secondary school in this state, including a charter school. Under the bill, the credit may not be claimed with regard to a pupil who participates in the school choice program. 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 \$250 for an elementary pupil (a pupil in kindergarten or grades one to eight) and \$500 for a secondary pupil (a pupil in grades nine to twelve). 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 credit may not be claimed by a nonresident or part-year resident of this state. The bill also requires an eligible institution to provide the

**BILL**

parent or guardian of a pupil a statement specifying the amount of tuition that the parent or guardian paid in that year for his or her pupil.

Under current law, as enacted in 2013 Wisconsin Act 20, the state budget bill, there is a subtract modification, or deduction, for tuition for educational expenses paid by a claimant in the year to which the claim relates, for the claimant's dependent children to attend an eligible institution, which is defined as any private elementary or secondary school, but not including a charter school. The maximum deduction for each elementary pupil is \$4,000 each year, and the maximum deduction for each secondary pupil is \$10,000 each year. The bill repeals this deduction that was created in the budget bill.

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:*

x

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

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

x

4           **SECTION 2.** 71.05 (6) (b) 49. of the statutes, as created by 2013 Wisconsin Act  
5 20, is repealed.

x

6           **SECTION 3.** 71.07 (8m) of the statutes is created to read:

7           71.07 (8m) TUITION EXPENSES CREDIT. (a) *Definitions.* In this subsection:

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

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

13           3. "Eligible institution" means any private school, as defined in s. 115.001 (3r),  
14 that meets all of the criteria under s. 118.165 (1), that is located in this state, and any  
15 charter school that is located in this state.

**BILL**

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

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

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

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

16           1. For taxable years beginning after December 31, 2013, an amount of up to  
17 \$250 for an elementary pupil.

18           2. For taxable years beginning after December 31, 2013, an amount of up to  
19 \$500 for a secondary pupil.

20           (c) *Limitations.* 1. The maximum credit that may be claimed under this  
21 subsection by a claimant who files as a single individual or head of household is the  
22 amount specified in one of the subdivisions under par. (b), for each elementary pupil  
23 or secondary pupil, in each year to which the claim relates. If an individual is an  
24 elementary pupil and a secondary pupil in the same taxable year, the claimant may  
25 claim the credit for only one grade for that pupil for that taxable year.

**BILL**

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

7           3. The maximum credit that may be claimed by each spouse of a married couple  
8 that files separately is 50 percent of the amount described in subd. 2.

9           4. No credit may be claimed under this subsection by a part-year resident or  
10 a nonresident of this state.

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

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

16           7. No credit may be allowed under this subsection with regard to a pupil who  
17 is participating in the program under s. 118.60 or 119.23.

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

20           (e) *Requirements for schools.* Annually, at the end of each year, an eligible  
21 institution shall provide the parent or guardian of each pupil who was enrolled in the  
22 eligible institution during that year a statement specifying the amount of tuition the  
23 parent or guardian paid to the school during that year on behalf of his or her pupil.

24

**SECTION 4.** 71.08 (1) (intro.) of the statutes is amended to read:  
*, as affected by 2013 Wisconsin Act 62*  
9  
145

**BILL**

LPS: added  
text is plain

Act  
62  
+ ACT  
145

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71.08 (1) IMPOSITION. (intro.) If the tax imposed on a natural person, married couple filing jointly, trust, or estate under s. 71.02, not considering the credits under ss. 71.07 (1), (2dd), (2de), (2di), (2dj), (2dL), (2dr), (2ds), (2dx), (2dy), (3m), (3n), (3p), (3q), (3r), (3rm), (3rn), (3s), (3t), (3w), (4k), (5b), (5d), (5e), (5f), (5h), (5i), (5j), (5n), (6), (6e), (8m), (8r), (9e), 71.28 (1dd), (1de), (1di), (1dj), (1dL), (1ds), (1dx), (1dy), (2m), (3), (3n), (3t), and (3w), 71.47 (1dd), (1de), (1di), (1dj), (1dL), (1ds), (1dx), (1dy), (2m), (3), (3n), (3t), and (3w), 71.57 to 71.61, and 71.613 and subch. VIII and payments to other states under s. 71.07 (7), is less than the tax under this section, there is imposed on that natural person, married couple filing jointly, trust or estate, instead of the tax under s. 71.02, an alternative minimum tax computed as follows:

**SECTION 5.** 71.10 (4) (i) of the statutes is amended to read:

71.10 (4) (i) The total of claim of right credit under s. 71.07 (1), farmland preservation credit under ss. 71.57 to 71.61, farmland preservation credit, 2010 and beyond under s. 71.613, homestead credit under subch. VIII, farmland tax relief credit under s. 71.07 (3m), dairy manufacturing facility investment credit under s. 71.07 (3p), jobs tax credit under s. 71.07 (3q), meat processing facility investment credit under s. 71.07 (3r), woody biomass harvesting and processing credit under s. 71.07 (3rm), food processing plant and food warehouse investment credit under s. 71.07 (3rn), film production services credit under s. 71.07 (5f), film production company investment credit under s. 71.07 (5h), tuition expenses credit under s. 71.07 (8m), veterans and surviving spouses property tax credit under s. 71.07 (6e), enterprise zone jobs credit under s. 71.07 (3w), beginning farmer and farm asset owner tax credit under s. 71.07 (8r), earned income tax credit under s. 71.07 (9e), estimated tax payments under s. 71.09, and taxes withheld under subch. X.

(END)

DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

-4419/1dn  
LRB-3475/1dn  
MES:sac:fs  
Stamps

~~December 3, 2013~~

- date -

Kaufert

Representative Kaufert:

[Redacted]

This drafter's note is meant to alert you that, should this bill become law, it could be challenged as possibly violating the Equal Protection and Establishment Clauses of the U.S. Constitution and the related provisions of the Wisconsin Constitution. A potential equal protection problem is that the ~~reduction~~ in this ~~amendment~~ is available only to parents of children who attend private schools, but not to parents of children who attend public schools <sup>other than charter schools</sup> <sup>credit</sup> <sup>bill</sup> and charter schools.

~~The other legal issues on the question of whether the bill may or may not be constitutional are contained in a recent drafter's note I sent you on a similar bill of yours, 2013 SB 170. Please let me know if you have any questions about the bill or the issues raised in the drafter's notes.~~

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

(2)

DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-2034/1dn  
MES:sac:jm

April 1, 2013

~~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.~~

NOA  
✓

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. (public)

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 that 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).

*[Handwritten scribble]*

Schools

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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-4419/1dn

MES:sac:jf

March 28, 2014

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 Equal Protection and Establishment Clauses of the U.S. Constitution and the related provisions of the Wisconsin Constitution. A potential equal protection problem is that the credit in this bill is available only to parents of children who attend private schools and charter schools, but not to parents of children who attend public schools other than charter 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 the credit in this bill is available to the parents of children who attend either sectarian or nonsectarian private schools and (public) charter schools, so 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.

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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).

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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)

**Parisi, Lori**

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**From:** Field, Adam  
**Sent:** Monday, March 31, 2014 9:17 AM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB -4419/1 Topic: Create a refundable individual income tax credit for private school tuition

Please Jacket LRB -4419/1 for the ASSEMBLY.