

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3856/1dn  
MES:kmg:rs

January 13, 2004

Representative Underheim:

As drafted, an eligible claimant could receive a credit under the bill even if his or her child receives a full scholarship to an eligible institution and the claimant bears no out-of-pocket expenses to send his or her child to the school. Is this consistent with your intent?

This drafter's note is also 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 tax credit is available only to parents of children who attend private schools, but not to parents of children who attend public schools. Opponents of the bill could also 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 would also be able to make several strong arguments against the bill's constitutionality. First, they could argue that this bill is different from the law addressed in *Mueller* because, unlike the Minnesota statute, the credit in this bill is not available to all parents — it is available only to the parents of children who attend sectarian or nonsectarian private schools so the bill arguably *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). Second, 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.

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 seems to be moving toward the view 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).

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.

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