



## Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #517

### **Special Needs Scholarships (DPI -- Choice, Charter, and Open Enrollment)**

[LFB 2013-15 Budget Summary: Page 375, #6]

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#### **CURRENT LAW**

Under state and federal law, public school districts are required to provide a free, appropriate education for children with disabilities ages 3 to 21 who reside in the district. Under state law, a child with a disability is defined as a child who, by reason of any of the following, needs special education and related services: cognitive disabilities, hearing impairments, speech or language impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or learning disabilities. In addition, a school district may include a child with a significant developmental delay who needs special education services, if consistent with DPI rules.

Special education is provided by school districts, either on their own or through cooperative arrangements with other districts, cooperative educational service agencies (CESAs), and county children with disabilities boards (CCDEBs). The state reimburses a portion of the costs of educating and transporting pupils enrolled in special education. By statute, the cost of special education for children in hospitals and convalescent homes for orthopedically disabled children is fully funded as a first draw from the special education aids appropriation. The following costs are also eligible for reimbursement from the appropriation but are subject to prorating when total eligible costs exceed the remaining funding available: salary and fringe benefit costs for special education teachers, coordinators, school nurses, school psychologists, school counselors, and others; the salary portion of an authorized contract for physical and occupational therapy services, orientation and mobility services, educational interpreter services, speech and language therapy, audiology, and other services approved by the State Superintendent; the cost of transportation for pupils enrolled in special education; the cost of board, lodging, and transportation of nonresident children enrolled in a district's special education program; salary and travel expenses for special education outside the school district of

employment; and any other expenditures approved by the State Superintendent as eligible for reimbursement.

Provisions of 1999 Act 9 extended eligibility for special education aid to independent "2r" charter schools. Charter schools that operate a special education program and that are determined by the State Superintendent to be in compliance with federal special education law may be reimbursed for transportation costs and for expenses for salaries of teachers, special education coordinators, school nurses, school psychologists, school counselors, and other staff approved by the State Superintendent.

## **GOVERNOR**

Create a special needs scholarship program, beginning in 2013-14, to allow a child with a disability to receive a scholarship to attend a participating public, private, or charter school of the child or the child's parent's choice. Provide \$6,946,000 GPR in 2013-14 and \$13,903,500 GPR in 2014-15 and create a new sum sufficient appropriation for the special needs scholarships.

Provide that, beginning in 2013-14, a child with a disability would receive a scholarship under the program to attend an eligible school, if the school district, charter school, or private school has notified DPI of its intent to participate, and the notice specifies the number of pupils in the program for whom the school has space. Permit the pupil's resident school district to count the pupil for the purposes of general aid and revenue limits. Require that the amount of general aid that a school district is eligible to be paid in the current school year be reduced by the total amount of scholarships paid for pupils who reside in that district. Require the State Superintendent to ensure that the total amount of aid withheld from school districts be lapsed to the general fund, and that the amount of the aid reduction does not affect the amount determined to be received as state aid by the district for any other purpose.

## **DISCUSSION POINTS**

1. Under the federal Individuals with Disabilities Education Act (IDEA), children with disabilities and their parents are entitled to a number of rights and procedural safeguards, including receiving written notice of parental rights overall, and information regarding parental rights in a number of specific situations, relating to the education of a child with disabilities. Information provided to parents must be written in plain language, and in the parent's native language wherever possible. In general, informed parental consent must be obtained for any evaluation, provision of services, or reevaluation. Parents also have a right to an independent educational evaluation, at the district's expense, by an examiner not employed by the district, if the parents disagree with the school district's evaluation of their child. Federal law specifies procedures for parents to file complaints with the state if a district violates IDEA, such as by failing to provide appropriate services.

2. Children with disabilities who are enrolled in a private school by their parents have no individual entitlement to receive the special education and related services they would receive if enrolled in a public school. A school district must only provide for the "equitable participation" of

parentally placed private school students with disabilities, as a group. The school district must annually determine the number of parentally placed students with disabilities attending private schools within the district, and annually spend a proportionate share of IDEA funds on special education and related services for private school students with disabilities as a group. Expenditures for special education, related services, and transportation, may be considered when determining whether the school district has expended a proportionate share of IDEA funds. Federal funds may not be paid directly to a private school; the school district must control and administer the funds under federal rules. If a student in private school will receive services from the school district, then the district develops a "services plan" for the student. The district is also required to inform parents that their school district of residence is responsible to provide the child with a free appropriate public education, if the child leaves the private school and enrolls in public school.

3. Under the special needs scholarship proposal, to be eligible for a scholarship, a child must have an individualized education program (IEP) or services plan in place, and have attended a public school, charter school, a private school under the Milwaukee or Racine parental choice programs, or not have been enrolled in school in this state, for the entire school year immediately preceding the school year for which the child would first receive a scholarship. Therefore, children who were enrolled in a private school, but not through a parental choice program, in the prior year would not be eligible for a scholarship.

4. Under special education laws, an IEP is a written statement for each child with a disability that is developed, reviewed, and revised in a meeting of the IEP team, including the child's parent or guardian, regular education teacher, special education services provider, and other school staff. The IEP describes the child's present level of performance, short-term benchmarks, annual goals, and progress toward goals, and it specifies what special education and related services are to be provided by school district staff, and in what amounts, as well as other details of the child's instruction. A services plan is defined under federal regulations to mean a written statement that describes the special education and related services that a school district will provide to a child with a disability who has been designated to receive services, and who has been parentally-placed in a private school, including the location of the services and any necessary transportation.

5. Under the bill, an eligible school would be defined as: (a) a public school located in this state, but outside the pupil's school district of residence; (b) a charter school located in this state, including a charter school located in the pupil's school district of residence and a virtual charter school; or (c) a private school located in this state. In order to participate, a school district, charter school, or private school must notify DPI of its intent to participate in the program, and provide the Department with the number of pupils under the program for whom the school has space. In addition, for a private school to be eligible, the school must either have its educational program reviewed and approved by the State Superintendent, or be accredited as of the August 1 preceding the school term for which the scholarship is awarded. The school may be accredited by any of the following: the Wisconsin North Central Association, Wisconsin Religious and Independent Schools Accreditation, the Independent Schools Association of the Central States, Wisconsin Evangelical Lutheran Synod School Association, National Lutheran School Accreditation, the diocese or archdiocese within which the private school is located, or any other organization recognized by the National Council for Private School Accreditation. A similar accreditation requirement, and the same allowable accrediting associations, currently applies for private schools entering the

Milwaukee or Racine parental choice programs.

6. Each private school participating in the special needs scholarship program would be required to do all of the following: (a) comply with all health and safety laws or codes that apply to private schools; (b) hold a valid certificate of occupancy, if required by the municipality in which the school is located or, if the municipality does not issue certificates of occupancy, obtain a certificate of occupancy issued by the local government unit with authority to do so; (c) comply with federal law that prohibits discrimination on the basis of race, color, or national origin; and (d) conduct criminal background checks of its employees and exclude from employment any person not permitted to hold a teaching license as the result of an offense and any person who might reasonably be believed to pose a threat to the safety of others. These requirements, excluding the requirement to conduct criminal background checks of employees, also apply to schools participating in the Milwaukee and Racine parental choice programs.

7. Under the proposal, a child with a disability, or the child's parent, would be required to submit an application to an eligible school for a scholarship to attend the school. DPI would be required to develop a document, to be included with the application, describing the rights of a child with a disability and his or her parent provided under federal special education law, which would not apply to a private school. Receipt and acknowledgement of that document would constitute notice that the applicant has been informed of his or her rights under the program and under federal law. If the child is accepted by the school, then the scholarship would be awarded.

8. If an eligible school were to receive more applications than the number of pupils for whom the school specified it had space, the school would be required to accept pupils on a random basis, except that it would be permitted to give preference to siblings of pupils already attending the school. The bill specifies that an application could be made, and a child could begin attending an eligible school, at any time during the school year. Once the pupil is accepted, the eligible school would notify DPI, which would in turn notify the pupil's district of residence. The district would then be required to forward a copy of the pupil's IEP to the eligible school and to DPI.

9. Opponents have argued that permitting students to transfer schools at any time during the school year under the special needs scholarship program could be disruptive to both the pupil's education, and to the special education programs in each school involved. Schools would not have an opportunity to plan for enrollment changes and to adjust staffing levels accordingly. This is particularly important in planning for special education program budgets in public schools, in that unanticipated revenue and expenditures can be problematic under federal regulations. On the other hand, under the current law open enrollment program, there is a specified application period each spring, which allows families and schools to plan and prepare for changes in enrollments and budgets. Additionally, the system ensures that for public schools, students are enrolled in the school they will attend on the statutorily specified count dates for purposes of revenue limits and general aid. The open enrollment application system also permits each school to determine more accurately how many places it will be able to offer to new students. If the special needs scholarship program is approved, it might be desirable to provide for a similar application period. Other states with special needs scholarship programs impose certain deadlines for applicants. There are also exceptions to this policy under the open enrollment program, for students who are repeatedly bullied or who are the victims of violent crimes, for example. These same exceptions could be applied to the special

needs scholarship program.

10. Under the bill, once DPI would receive the IEP, the Department would be required to determine the amount of the pupil's scholarship, which would be the lesser of two amounts. The first amount would be equal to the statewide gross property tax levy for schools in the previous year plus the total amount of general school aid appropriated in the previous school year, divided by the total statewide membership in the previous school year, plus the result obtained by dividing the amount provided in the primary special education categorical aid appropriation in the previous year by the total FTE number of children with disabilities enrolled in public schools in the previous school year. To accomplish the intent of this provision, an incorrect reference to a different appropriation would need to be changed to reference the primary general school aid appropriation. In addition, the federal child count conducted each October for children with disabilities is an unduplicated count, but it is not calculated on an FTE basis. Therefore, it might be desirable to allow that federal count to be used as the count of children with disabilities for the purposes of the calculation. Using figures for 2011-12, this amount would equal \$13,422 per scholarship.

11. The second possible scholarship amount would equal the cost to the school district of attendance, the eligible charter school, or the eligible private school of providing to the pupil regular instruction, instructional and pupil support services, special education and related services, supplementary aids and services, and operating and debt services costs per pupil that is related to educational programming. However, because DPI currently does not collect special education cost data on a per pupil basis for specific pupils, the Department does not have access to cost data for private schools, and private schools are not required to report such data to DPI, staff from DPI indicate that it would not be possible to administer this provision. Therefore, it is anticipated that each scholarship would be calculated using the first method, using gross property taxes and general school aid divided by total membership, and special education aid divided by the number of children with disabilities in the state, to arrive at a per pupil amount.

12. Because the special needs scholarships would likely use the statewide per pupil revenue amount described above, it is possible that the state K-12 finance system would spend more to educate special needs pupils than is currently the case. Opponents of special needs voucher programs have argued that, absent thorough enrollment standards for private schools participating in such programs, the schools have an incentive to provide less costly services, to avoid attracting high-cost students. In some cases, schools receive the same funding from the state for a low-cost student as they would for a high-cost student. For example, if as DPI argues it is not possible to calculate special education costs for pupils in private schools, and more than \$13,000 would be paid for each pupil regardless of disability, private schools may have an incentive to provide a limited slate of services. For example, a school might offer limited services that are appropriate for relatively high-incidence disabilities, such as speech language problems, but inadequate for those experiencing severe disabilities, and thus avoid attracting high-cost students who require more intensive services. The result might be fewer choices for students with more severe disabilities, compared to choices for students who have less severe disabilities. Under the bill, each participating private school would be required to provide a profile of its special education program to each scholarship applicant's parents, but the school would not be required to modify that program or include any specific services in their programs. Private schools are under no obligations to provide special education, or to modify their instructional programs to meet students' exceptional

educational needs. Instead, under the bill, the private school would be required to implement the child's most recent IEP, as modified by agreement between the private school and the child's parent.

13. The bill would require that the amount of general aid that a school district is eligible to be paid in the current school year would be reduced by the total amount of scholarships paid for pupils residing in the district. In 2012-13, there were 20 school districts who qualified for no equalization aid, although all but two districts received some amount of special adjustment aid. For these school districts that receive no or very small amounts of general aid, it is possible that the cost of a special needs scholarship for a resident pupil could not be fully funded from the district's general aid. In such a case, the scholarship would still be paid from the sum sufficient appropriation created for special needs scholarships, and the cost would be covered by the general fund.

14. The number of scholarship recipients for any school year would be limited to 5% of the total number of children with disabilities residing in the state in the previous year, as determined by DPI. Similar to the calculation to be performed to calculate scholarship amounts, it might be desirable to specify that DPI could use the federal children with disabilities count conducted each October to calculate the 5% cap, since there is no mechanism currently to count children with disabilities on an FTE basis. Also, in the event that there would be more applicants than there were scholarships allowed under the 5% cap, the bill does not specify a method of apportioning available spaces among participating schools. For example, available scholarships could be apportioned according to the population of the city or county in which participating schools are located, or an effort could be made to distribute slots more evenly across each geographic region of the state. Alternatively, DPI could prorate the number of scholarships proportionately, based on the ratio of scholarships to the reported number of spaces available at each participating school.

15. The bill would require that the resident school district ensure that the child's IEP team reevaluates the child every three years. However, under IDEA, there is no recognition of special needs vouchers. A parent who enrolls a child in private school using a special needs voucher or scholarship is viewed the same as any other parent who unilaterally places their child in private school. These parents waive many of their federal rights and protections, and the child no longer has an active IEP, to which they are only entitled in a public school. The IEP would no longer be a legal document once the child is enrolled in private school. Likewise, the IEP team would functionally no longer exist, as an IEP team, as defined under state and federal law, consists of the child's parents, the child's regular education teacher, a school district special education teacher, a school district supervisor, plus other individuals with special expertise about the child. Staff from the resident school district would no longer necessarily have contact with the child, nor maintain or have access to records of the child's academic progress. It is unclear how a resident district could meaningfully reevaluate the child and update the IEP.

16. Opponents of the special needs scholarship proposal have argued that the program as proposed under the bill would increase overall costs for school districts, while jeopardizing compliance with federal maintenance of effort requirements and federal funding. AB 40 would specify that, whenever a pupil would receive a special needs scholarship, DPI and the school board of the pupil's resident school district would be required to count the scholarship amount toward federal maintenance of effort (MOE) requirements. Under IDEA, school districts are required to spend the same amount of local funds from year to year for the costs of providing special education

instruction and related services, per a student's IEP, which are incurred above and beyond general education costs. Each fiscal year, a district must budget the required MOE level of special education expenditures in the current year, in order to be eligible to receive any IDEA funds for that year. Revenue the district receives for special education services, such as Medicaid reimbursement for school based services, is deducted from local expenditures to determine the district's net costs. State special education categorical aid reimbursement, per IDEA, is not deducted. Failure to maintain local effort, in other words to actually expend the same amount for local special education costs from year to year, results in a cash penalty. A district that fails MOE must pay, with local general funds (not special education funds), an amount equal to the difference between the special education expenditures in the two years examined. The following year, the district is again responsible for meeting the same level of funding as the second prior year. In other words, the district's MOE is not reduced by the amount by which the district missed MOE in the prior year. The same level of funding must be met.

17. There are a limited number of reasons allowed under federal law for a district to reduce expenditures and not incur the cash penalty, which are: (a) the voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel; (b) a decrease in the enrollment of children with disabilities; (c) the termination of the obligation of the district to provide special education to an exceptionally high-cost child with a disability because the child has: (1) left the district; (2) reached the age at which the obligation to provide FAPE to the child has terminated; or (3) no longer needs the program of special education; (d) the pay-off of costly special education capital equipment or capital projects; or (e) the assumption of costs by the high-cost special education aid program. Other rationales or circumstances, for example, achieving lower costs through renegotiated contract services, layoffs, or employee fringe benefit changes, are unacceptable reasons for lowering special education expenditures. Districts who lower special education expenditures for any but the enumerated, acceptable reasons have failed MOE.

18. A pupil who would accept a special needs scholarship would not be considered to have left the resident district, if the student continued to reside within the district. For example, a special education student who, under open enrollment, transfers to another district does not qualify as having left the district. A special needs scholarship student would also be counted by the resident district for the purposes of general aid and revenue limits under the bill, and the bill as proposed would require the resident district to periodically reevaluate the pupil and update the pupil's IEP.

19. The total amount of special needs scholarships paid by the school district would be considered special education expenditures, and as such, would increase the district's required maintenance of effort amount for the following year by the amount of the scholarships. In other words, the district would not be allowed to subsequently lower their required MOE if, for example, a scholarship pupil chose to return to the district the next year. The district would need to continue to spend the same amount, even after the district's scholarship costs decreased. In addition, if no more than a handful of special needs students, in similar grades or with similar services needs, would leave a given district at one time to enroll in a private school, it is possible that the district's costs would not decrease when the district stopped serving them.

20. For example, an average-sized Wisconsin school district has approximately 2,000

students, and an average rate of students identified as having disabilities would be approximately 15%, or 300 students with disabilities. Speech and language impairments are among the most common disabilities, affecting approximately 25% of all children with an identified disability. Therefore, such a district could employ 2.0 FTE speech and language pathologists, serving a combined 75 students at various grade levels. Such a district, on average, could serve 10 special needs students, who have been enrolled in private schools located in the district by their parents, through an IDEA equitable services program. If, for example, an additional 10 students from such an average district were to choose private schools due to the availability of scholarships, doubling the current rate of parental placement in private schools, the cost to the district for scholarships could be approximately \$134,000, at an estimated \$13,400 per scholarship. On average three of those pupils would have speech and language impairments, and would represent \$40,200 in added costs for their scholarships. However, the caseloads of the 2.0 speech and language pathologists would drop from a combined 75 to a combined 72. In such a scenario, the school district would have to retain both full-time speech and language pathologists, to continue to be able to provide the remaining children an adequate level speech and language therapy. The district would therefore see no savings attributable to those three speech and language students enrolling in private school. At the same time, the district would be required to increase the amount of IDEA funding it spends for equitable services, due to the increased number of pupils enrolled in the private schools in the district.

21. Under federal special education regulations, the parent of a child with a disability has the right to revoke consent for special education services. The revocation of consent relieves the school district of the responsibility to provide a free and appropriate education (FAPE). It also removes the child from the IEP, meaning the child would no longer be provided accommodations and modifications, nor special education services. However, because the resident school district would no longer be responsible to provide the child with FAPE, the special education pupil count for the district is decreased, the district's maintenance of effort requirement under IDEA could also be decreased. In some states that make special education scholarships available, parents of children applying for a scholarship to a private school either revoke consent for special education services, or they are advised that acceptance of the scholarship has the same effect as parent revocation of consent for special education services.

22. However, it is important to note that if a child were to return at any point to public school, after the child's parent has revoked consent for special education services, then the child would not be considered a child with a disability by the school district until a new referral and evaluation would take place. A school district has 15 days after receiving a referral for evaluation to send the parents a request for consent to evaluate the child. A school district has 60 days, after receiving parental consent, in which to conduct an evaluation and determine whether a child has a disability, and another 30 days to conduct an IEP development meeting and determine placement. While this process would take place, the child would not receive interim special education services, possibly causing the child to fall behind, academically, behaviorally, or otherwise, depending on the nature of the disability.

23. Opponents of special needs voucher programs have also argued that, research largely encourages integration of students with disabilities within the general school population. Contact with peers, who model typical speech and behavior, for example, can have significant

benefits for children with disabilities, as well as broadening the experiences of their typical peers. Special needs voucher programs could result in further segregation of students with disabilities, if parents were to choose specialized schools or were accommodated in only a limited number of private schools.

24. Under the public school open enrollment program, a pupil may attend a public school located outside his or her school district of residence, if the pupil's parent or guardian complies with certain application dates and procedures. A child with a disability may apply for open enrollment, and the nonresident school district must prepare an estimate of the costs to provide the special education or related services required in the child's IEP. The resident district must pay tuition for the child to attend the nonresident district. If the resident district determines that the costs of the special education program or services required by the child's IEP that would be provided by the nonresident district would be an undue financial burden on the resident district, the resident school board can prohibit the pupil from attending the nonresident district. In 2012-13, there were 485 such denials by resident school districts due to an undue financial burden.

25. One alternative to a special needs scholarship program would be to repeal the undue financial burden exemption, for resident districts of children with disabilities. This alternative would require that, if a child's parent properly applied for the open enrollment program, and the nonresident district would have space available for the pupil, then the resident district could not prohibit the pupil from attending the nonresident district. The resident district would be required to pay the necessary tuition on behalf of the child. If the resident district objects to the nonresident district's cost calculations, then the resident district could appeal the amount to DPI, stating its reasons for the appeal, and the nonresident district could be given an opportunity to document its costs. DPI's ruling on the amount of tuition to be paid by the resident district could be considered final. If the goal is to provide additional public educational options to parents of children with disabilities, expanding the open enrollment program in this manner would accomplish that goal, while ensuring that children retain their rights and protections under federal law, and within an established financial framework that would not jeopardize school district IDEA funding.

## **ALTERNATIVES**

1. Approve the Governor's recommendation, with a technical modification to correct an appropriation reference.
2. Modify the Governor's recommendation in any of the following ways:
  - a. Provide that the October 1 federal child count as the basis for the calculation of the 5% cap on special needs scholarships and as the count of children with disabilities to be used to calculate the maximum scholarship amount;
  - b. Delete the Governor's recommendation for a second possible calculation of scholarship amounts, which would be based on per pupil special education cost information;
  - c. Modify the Governor's recommendation to provide that, if there are more applicants than scholarships available, DPI would prorate the number of scholarships allocated to each

participating school based on the number of seats the school reported it had available. If in any year a school rejects applicants due to a lack of space, provide that the number of applicants the school accepts in that year would be the maximum capacity for future years' prorated allocation of scholarships;

d. Modify the Governor's recommendation to require that, before accepting a special needs scholarship, parents be required to acknowledge in writing that by accepting a special needs scholarship, the parents are revoking parental consent for special education and related services, that the child's school district would no longer be required to make a free and appropriate public education to the child, the school district would no longer be required to develop an IEP or conduct IEP meetings, and the school district would no longer be required to offer the child the discipline protections provided under the IDEA;

e. Modify the Governor's recommendation to provide that applicants for scholarships would apply during the annual open enrollment application period, and provide that the current law exceptions provided to the open enrollment application period would likewise apply to applicants for special needs scholarships.

3. Delete the Governor's recommendation. Instead, repeal the undue financial burden exemption under open enrollment for children with disabilities. Require the resident district to pay tuition based on the nonresident district's calculation of its costs to fulfill the child's IEP. Permit the resident district to appeal the tuition calculation to DPI, and provide that DPI's ruling on the tuition amount would be final.

<b>ALT 3</b>	<b>Change to Bill</b>
	Funding
GPR	- \$20,849,500
Aid Reductions	- <u>20,849,500</u>
Net GPR	\$0

4. Delete provision.

<b>ALT 4</b>	<b>Change to Bill</b>
	Funding
GPR	- \$20,849,500
Aid Reductions	- <u>20,849,500</u>
Net GPR	\$0

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