Legislative Fiscal Bureau
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May 5, 2011

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 94: Milwaukee Parental Choice Program Payments and Audits

Assembly Bill 94 would modify payment processes and audit requirements under the Milwaukee parental choice program. AB 94 was introduced on April 13, 2011, and referred to the Assembly Committee on Education. On April 26, 2011, the Committee recommended it for passage on a 7-4 vote.

BACKGROUND

Under the choice program, state funds are used to pay for the cost of children from low-income families to attend, at no charge, private schools located in the City of Milwaukee. Pupils in grades K-12 with family incomes less than 175% of the federal poverty level ($39,630 for a family of four in 2010-11) who reside in the City are initially eligible to participate in the program. Continuing pupils and siblings of current choice pupils are eligible to participate if family incomes are less than 220% of the federal poverty level ($49,818 for a family of four in 2010-11). The limit on the number of pupils who can participate in the program is statutorily set at 22,500 full-time equivalent pupils. To participate in the program, a child's parent or guardian must submit an application to a participating choice school on a form provided by the State Superintendent.

The per pupil payment for a school in the choice program in 2010-11 is equal to the lesser of $6,442 or the school's operating and debt service cost per pupil related to educational programming, as determined by the Department of Public Instruction (DPI). Under DPI rule, a school's educational programming cost is reduced by the following offsetting revenues: (a) fees charged to pupils for books and supplies used in classes and programs; (b) rentals for school buildings; (c) food service revenues; (d) governmental financial assistance revenues; and (e) interest earnings and other income resulting from the investment of debt proceeds.

The State Superintendent is required to pay the parent or guardian of a pupil enrolled in a choice school from a separate, general purpose revenue sum sufficient appropriation established for this purpose. This payment is made in four equal installments in September, November, February, and May of each school year and the checks are sent to the school. The parent or guardian is required to restrictively endorse the check for the use of the school.

The State Superintendent is also required to pay the parent or guardian of a choice pupil enrolled in a choice school for summer classroom or laboratory periods for necessary academic purposes. The summer school payment is determined by multiplying the full-time equivalent (FTE) summer choice membership by 40% of the per pupil payment amount under the choice program. The State Superintendent can include the entire summer school payment in one of the quarterly installments or apportion the amount among several quarterly installments.

Annually, by September 1 following a school year in which a school participated in the choice program, the school must submit to DPI: (a) an independent financial audit of the school conducted by a certified public accountant; and (b) evidence of sound fiscal practices, as prescribed by DPI by rule.

If the total of the per pupil payments for which a choice school is eligible after cost and membership auditing is less than the total of the quarterly payments retained by a choice school in a given year, the school is required by rule to refund the amount of any overpayment to DPI within 60 days of notification. This revenue is deposited into the state general fund.

By law, DPI is required to reduce the general school aids for which the Milwaukee Public Schools (MPS) is eligible by 45% of the estimated total cost of the choice program. The October 15, 2010, general school aids calculation uses an estimate of $130.8 million for the total cost of the choice program in 2010-11. Thus, MPS's general school aids will initially be reduced by a total of $58.8 million.

In 2010-11, DPI is required to pay the City an amount equal to 6.6% of the estimated total cost of the choice program, for the purpose of defraying the choice program levy it raises on behalf of MPS. As a result, the net choice aid reduction for MPS in 2010-11 is equal to 38.4% of the estimated total cost of the choice program. In 2010-11, the City will be paid $8.6 million for the purpose of reducing the choice levy. The net reduction for MPS is thus $50.2 million.

Under revenue limits, MPS can levy to make up for the aid reduction. By law, any high poverty aid MPS receives must be used to offset the choice levy attributable to the reduction in general school aid. In 2010-11, MPS will receive $9.7 million in high poverty aid. After consideration of this aid, the effective aid reduction for MPS related to the choice program is $40.5 million, which is 31.0% of the estimated cost of the program in 2010-11.

SUMMARY OF BILL

AB 94 would specify that if more than one pupil from the same family applies to attend the

same choice school, the pupils may use a single application.

Under the bill, DPI would directly pay each choice school in which a pupil is enrolled on behalf of the pupil's parent or guardian. Each installment could consist of a single check for all choice pupils attending the choice school. The current law requirement that a child's parent or guardian must restrictively endorse the check for the use of the school would be deleted. At the public hearing of the Assembly Committee on Education on AB 94, a request for information was made regarding the constitutionality of this provision. The attached memorandum, prepared by the Legislative Council, addresses that issue.

The State Superintendent would be required to make the summer school payment to a school with the November quarterly installment, but as a separate check from the November installment. The bill would delete the 40% multiplier applied to the per pupil payment amount under the choice program for summer choice FTE membership.

The bill would place in statute the five offsetting revenue categories currently in DPI rule for determining a school's educational programming cost. The bill would also specify that only those categories could be subtracted, up to the actual cost of the service or material related to each item.

In determining operating and debt service cost per pupil, the bill would also require DPI to include an amount equal to 10.5% of the fair market value of the school and its premises if: (a) legal title to the school's buildings and premises is held in the name of the school's parent organization or other related party; (b) there is no other mechanism to include the school's facilities costs in the calculation of its operating and debt service cost; and (c) the school requests that the Department do so. Any request made by a school would remain effective in subsequent school years and may not be withdrawn by the school. If immediately prior to the effective date of the bill, a school's operating and debt service costs, as determined by DPI, included the amount described above, that amount would continue to be included in subsequent school years.

The bill would specify that the certified public accountant conducting the audit of the school be independent. Under the bill, the auditor would be required to conduct his or her audit, including determining sample sizes and evaluating financial viability, in accordance with the auditing standards established by the American Institute of Certified Public Accountants. DPI would be prohibited from promulgating rules that establish standards exceeding the standards established by the American Institute of Certified Public Accountants. Under the bill, the Department could also not require an auditor to comply with standards that exceed the scope of the standards established by the American Institute of Certified Public Accountants.

In addition to evidence of sound fiscal practices, a choice school would also be required to submit evidence of internal control practices. An auditor engaged to evaluate the school's fiscal and internal control practices would be required to conduct his or her evaluation, including determining sample sizes, in accordance with attestation standards established by the American Institute of Certified Public Accountants.

The bill would first apply to applications to attend a school and payments made to schools in the 2012-13 school year.

ASSEMBLY AMENDMENT 1

Assembly Amendment 1 would delete the bill provisions related to the modifications to the summer school payment calculation. Under the amendment, DPI would: (a) determine the choice school's operating and debt service cost per pupil in summer school that is related to educational programming; (b) multiply that amount by 40%; and (c) multiply that amount by the summer choice FTE.

FISCAL EFFECT

In its fiscal note, the Department noted that the bill would reduce administrative costs as a result of being required to process and mail fewer aid checks. The Department indicated it could also incur additional administrative costs to define the actual cost of the service or material related to each item in the operating and debt service calculations. These amounts are indeterminate.

Administrative costs to choice schools would also be reduced as a result of having to process fewer checks. In addition, administrative costs for choice schools could be reduced as a result of having to process fewer applications, if multiple children would apply to the same school under a single application. These amounts are indeterminate.

The Department also indicated it would incur administrative costs to reprogram its information technology systems to make the changes under the bill to send one check to schools, make a separate summer payment, and to allow a parent to complete one application for multiple children applying to the same choice school. DPI estimated these total costs at $44,200. No additional funding would be provided under the bill.

It is estimated that the total of the summer school payments for choice schools under the 40% multiplier for the 2010-11 school year is $523,100. The 100% summer school payment to choice schools under the bill would be $1,307,800, an increase of $784,700. The 61.6% state share would be $483,400, while the 38.4% MPS aid reduction would increase by $301,300. Assembly Amendment 1 would modify the bill to restore the 0.4 multiplier as under current law, but calculate the payment based on the private school's operating and debt service cost per pupil in summer school that is related to educational programming. While it appears that AA 1 would reduce the fiscal effect of the bill by restoring the 0.4 multiplier, operating and debt service costs for summer school is not readily available.

Also, to the extent that the bill would change the calculation of per pupil costs for an individual choice school, it could affect the amount of money deposited in the state general fund if it differs from the quarterly payments made to the school, but the effect is indeterminate.

Prepared by: Russ Kava
Attachment

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: MEMBERS OF THE ASSEMBLY COMMITTEE ON EDUCATION

FROM: Katie Bender-Olson, Staff Attorney KBO

RE: Constitutionality of Issuing Checks Directly to Participating Schools

DATE: April 25, 2011

This memorandum responds to a request for information made during the April 19, 2011, public hearing of the Assembly Committee on Education. The request was for information regarding the constitutionality of provisions included within 2011 Assembly Bill 94, relating to the ability of the Department of Public Instruction (DPI) to issue a single check directly to a private school participating in the Milwaukee Parental Choice Program (MPCP), rather than issuing individual checks in the name of each participating pupil's parent and requiring the parent to sign the check over to the school.

2011 Assembly Bill 94

Under current law, DPI pays private schools participating in the MPCP by issuing checks in the name of each pupil's parent and sending the checks to the appropriate school. Each pupil's parent or guardian must then endorse the check for use by the school.

Assembly Bill 94 eliminates the requirement that DPI issue an individual check to each pupil's parent or guardian. The bill allows DPI to issue payment directly to the participating school and allows payments for all pupils attending a particular school to be combined as a single check.

Background on Payment Provisions

The MPCP was enacted in 1989 Wisconsin Act 336 as a taxpayer funded voucher program allowing low-income children in Milwaukee to attend private schools. Initially, the MPCP included only nonsectarian private schools and did not include religious schools. The program, as originally enacted, also provided for direct payments to participating private schools and did not require DPI to issue checks in the name of parents or guardians.

These provisions were changed by 1995 Wisconsin Act 27 (the 1995-97 Biennial Budget Act). Among other modifications to MPCP, Act 27 expanded the program to include sectarian private schools,

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allowing MPCP pupils to attend schools with religious affiliations. Act 27 also altered the process for issuing payments to participating schools. The Act discontinued direct payments to schools and required the payment of funds to a pupil's parent or guardian for endorsement to the school.

Constitutionality of Changes

The constitutionality of direct payments to religious schools participating in the MPCP has never been directly addressed by a court. However, the constitutionality of the MPCP has been upheld by the Wisconsin Supreme Court on two occasions and the constitutionality of a school voucher program in Ohio was upheld by the U.S. Supreme Court. Though these decisions did not specifically address direct payments to religious schools, they suggest that a court may find such a provision to be constitutional.

The Wisconsin Supreme Court first upheld the constitutionality of the MPCP in *Davis v. Grover*, 166 Wis. 2d 501, a case decided in 1992. The parties challenging the program argued that it was unconstitutional because: (a) the MPCP constituted a private or local bill and violated art. IV, sec. 18 of the Wisconsin Constitution; (b) the MPCP payment of public monies to private schools violated the uniformity clause of art. X, s. 3 of the Wisconsin Constitution, which requires the establishment of uniform school districts; and (c) the MPCP violated the public purpose doctrine requiring that public funds be spent only for public purposes. The Wisconsin Supreme Court rejected each of these arguments and upheld the program as constitutional.

At the time the Wisconsin Supreme Court upheld the program in *Davis v. Grover*, the MPCP paid public funds directly to participating private schools. The direct payment provision was not identified by the court as an obstacle to the constitutionality of the MPCP. However, the MPCP did not include nonsectarian schools at the time of *Davis v. Grover*, so the decision did not account for direct payments to religious schools or constitutional challenges based on government funding of religious schools.

The Wisconsin Supreme Court upheld the constitutionality of the MPCP for a second time in *Jackson v. Benson*, 218 Wis. 2d 835, a case decided in 1998. The parties challenging the program argued that the MPCP was unconstitutional because it: (a) violated the Establishment Clause of the First Amendment of the U.S. Constitution, which prohibits Congress from making a law that advances or inhibits religion; (b) violated the Establishment Clause contained in art. I, s. 18 of the Wisconsin Constitution; (c) constituted a private or local bill in violation of art. IV, s. 18 of the Wisconsin Constitution; (d) violated the uniformity clause of art. X, s. 3 of the Wisconsin Constitution; (e) violated the public purpose doctrine; and (f) violated the Equal Protection Clause of the U.S. Constitution. The court rejected these arguments and upheld the program as constitutional.

At the time the Wisconsin Supreme Court upheld the MPCP in *Jackson v. Benson*, the changes made by 1995 Wisconsin Act 57 had been enacted, which required payment to parents and guardians and allowed participation by religious schools. The Wisconsin Supreme Court considered the constitutionality of the program's payment of public monies to religious schools under the Establishment Clause of the U.S. Constitution and art. I, s. 18 of the Wisconsin Constitution, which constitutes the state's version of the Establishment Clause of the U.S. Constitution. The court concluded that the MPCP was constitutional because it had a secular purpose, it did not have the primary effect of advancing religion, and because it would not lead to excessive entanglement between the state and participating religious schools. [*Jackson*, 218 Wis. 2d at 853-54, 875-76.] However, the court did not

address the question of whether *direct* payments issued to religious schools were problematic because direct payments were no longer being utilized under the version of the MPCP in place at the time the court case was filed.

Although the Wisconsin Supreme Court did not explicitly resolve the constitutionality of direct payments to religious schools in *Davis v. Grover* or *Jackson v. Benson*, the court did make statements suggesting that the precise procedures for paying MPCP participating schools is not determinative in evaluating the constitutionality of the program. The court stated:

> We recognize that under the amended MPCP the State sends the checks directly to the participating private school and the parents must restrictively endorse the checks to the private schools. Nevertheless, we do not view these precautionary provisions as amounting to some type of "sham" to funnel public funds to sectarian private schools. In our assessment, the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path...not one cent flows from the State to a sectarian private school under the amended MPCP except as a result of the necessary and intervening choices of individual parents.

[*Jackson v. Benson,* 218 Wis. 2d 835, 872.]

The court's statements suggest that the central consideration in evaluating the constitutionality of the MPCP and its payment structure is whether government funds are flowing to sectarian private schools as the result of private choices, or whether they are flowing to sectarian private schools as the result of government intent to advance religion or promote religious schooling.

The court's emphasis on whether public aid flows to religious schools as the result of individual choices by parents suggests that the specific payment procedure may not affect the constitutionality of the MPCP. However, this cannot be known with certainty. The existing procedure that requires issuance of checks in the name of a parent and endorsement over to the school more clearly establishes that religious schools receive public monies as the result of parental choices. Therefore, it is possible that a court could conclude that modification to allow direct payment to schools alters the constitutional analysis.

Additionally, as demonstrated in *Davis v. Grover* and *Jackson v. Benson*, the Wisconsin Supreme Court recognizes a strong presumption of constitutionality for duly enacted statutes. Because MPCP is a duly enacted statute, the court will presume that the program is constitutional and any party that challenges the MPCP must demonstrate that the program is unconstitutional beyond a reasonable doubt. [*Jackson*, 218 Wis. 2d 835, 853.] Therefore, if the statutory provision providing for direct payment to participating schools is enacted into law, the provision is presumed to be constitutional until a challenger overcomes the significant burden of proving otherwise.

The constitutionality of a school voucher system has been upheld by the U.S. Supreme Court and the constitutionality of the MPCP has been specifically upheld by the Wisconsin Supreme Court. The decisions issued by the Wisconsin Supreme Court provide support for the constitutionality of the program, even if the program is modified by Assembly Bill 94 to allow direct payments to participating

religious schools, provided that direct payments are made as "a result of the necessary and intervening choices of individual parents." However, the court has never directly addressed this issue, so the outcome of a legal challenge on the basis of the modification cannot be known with absolute certainty.

If you have any questions or need additional information, please do not hesitate to contact me at the Legislative Council staff offices.

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