



# State of Wisconsin

## LEGISLATIVE REFERENCE BUREAU

Informational Memorandum 98-1

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### MILWAUKEE CHOICE VOUCHER PROGRAM: AN UPDATE

On June 10, 1998, the Wisconsin Supreme Court ruled in a 4-2 decision that the state may fund vouchers to be used for enrolling low-income Milwaukee students in private religious schools as part of the Milwaukee Parental Choice Program. In reversing lower court rulings, the court said that opening the program to religious school enrollments does not violate the Wisconsin Constitution prohibition against expending state funds for religious purposes.

Relative to the U.S. Constitution, the Wisconsin court held the Choice Program does not violate the First Amendment guarantees of religious freedom and the separation of church and state. It concluded that the Choice Program meets the three-prong test set down by the U.S. Supreme Court in such cases because: 1) it has a legitimate secular purpose; 2) it does not have the primary effect of advancing religion; and 3) it will not lead to excessive entanglement between the state and participating private schools.

#### CURRENT PROVISIONS

In the 1990-91 school year, Wisconsin was the first state to implement a large scale voucher program that uses tax money to pay for educating pupils at private nonsectarian schools. 1995 Wisconsin Act 16 expanded the program to vouchers for children attending religious schools.

The Choice Program, authorized in Section 119.23, Wisconsin Statutes, permits up to 15% of the children in the City of Milwaukee Public School District (MPS) (approximately 15,000 pupils) to attend any participating private school located within the city.

To be eligible, the pupil's family must have a total family income not more than 175% of the poverty level established by the federal government. For the 1998-99 school year, the maximum allowable income for a family of three is \$23,888 and for a family of four, \$28,788.

Attendance at a religious school does not mean a pupil has to participate in sectarian instruction. If a parent or guardian requests that the student be excused from any religious activities sponsored by a private school, the request must be honored. The private school may enroll as many Choice students as it wants. If the school receives more applicants than available spaces, it must determine which ones to accept on a random basis, except it may give preference to siblings of those already accepted. Choice tuition checks are sent by the state to the designated private school, but they must be endorsed by the pupil's parent or legal guardian. Private schools must accept, as total payment for tuition, the lesser of either the amount of state aid MPS would have received for the pupil or an amount determined by the Wisconsin Department of Public Instruction (DPI) to be equal to the school's per pupil operating and any debt service costs that are related to educational programming. Private schools are required to submit the results of an independent financial audit annually to DPI.

Participating private schools must adhere to all health and safety laws or codes that apply to public schools and must meet at least one of the following standards: 1) at least 70% of the pupils in the program must advance one grade level each year; 2) the average attendance rate

for choice pupils at the school must be at least 90%; 3) at least 80% of the pupils in the program demonstrate significant academic progress; or 4) at least 70% of the families of pupils in the program meet parental involvement criteria established by the private school. DPI monitors pupil performance of Choice enrollees and determines if schools meet at least one of the standards.

## LEGISLATIVE AND JUDICIAL HISTORY

### FAILED ATTEMPTS

**1987 Assembly Bill 866** (budget adjustment bill -- entire bill failed to pass). AB-866 would have allowed up to 1,000 MPS pupils enrolled in kindergarten through grade 6 to attend any public or private school in Milwaukee County, beginning in the 1989-90 school year, if they were eligible for the federal free lunch program. Parents or guardians would have received an amount equal to the average tuition charged at the school, and MPS would have forfeited the amount of state aid it would have received for that pupil. Religious or sectarian private schools would have been eligible to participate.

**1989 Senate Bill 31** (biennial budget bill) included school choice provisions that were deleted by the adoption of Senate Substitute Amendment 1. Beginning in the 1990-91 school year, SB-31 would have permitted up to 1,000 pupils in grades K to 6, who are eligible for the federal free lunch program, to attend any private, nonsectarian school in Milwaukee County. The Superintendent of Public Instruction would pay to the parent or guardian an amount equal to the average tuition charged pupils attending the school and would deduct from state aids to MPS the amount it would have received for that pupil.

**1989 Assembly Bill 601** (Passed by assembly, failed to pass senate). AB-601, as amended by Assembly Substitute Amendment 1, would have provided state aid for up to 1% of the MPS membership to attend private, nonsectarian schools at state expense, beginning in the 1990-91 school year, provided the total family income did not exceed 175% of the federal poverty level. No more than 49% of a private school's enrollment could consist of Choice pupils.

### CHOICE PROGRAM CREATED

**1989 Wisconsin Act 336** (1989 Senate Bill 542, budget adjustment bill). Beginning in the 1990-91 school year, state aid could be used by up to 1% of the MPS membership to attend private, nonsectarian schools (grades K to 12), provided the total family income does not exceed 175% of the federal poverty level. No more than 49% of a private school's enrollment could consist of Choice pupils.

### COURT ACTION RELATED TO 1997 WISCONSIN ACT 336

**Circuit Court Rules Choice Program Constitutional** – August 6, 1990. In a suit filed by a group representing Choice students and parents, Dane County Circuit Court Judge Susan Steingass ruled that the Choice program is designed to benefit the entire state and therefore is not a constitutionally invalid private or local law.

**Appeals Court Rules Choice Program Unconstitutional** – November 13, 1990. In an opinion written by Judge Paul Gartzke, the Wisconsin Court of Appeals reversed the circuit court, concluding that the Choice program violated the constitutional provision that requires matters of purely local interest or effect to be passed in separate bills. (Choice was enacted as part of an omnibus budget bill.)

**Wisconsin Supreme Court Upholds Choice as Constitutional** – March 3, 1992. (*Davis v. Grover*, 166 Wis. 2d 501) The 4-3 majority held that the program was not a private or local

law improperly enacted as part of the omnibus state budget bill. Justice William Callow stated in the majority opinion that the purpose of this experimental legislation is to determine if it is possible to improve, through parental choice, the quality of education in Wisconsin for children of low income families. Logically, the best location to test the program is in a city such as Milwaukee where the socioeconomic disparities and educational problems are particularly great and the potential private educational choices are the most abundant.

**Federal District Court Rules State Not Required to Pay for Religious Schools** – March 14, 1995. In *Miller, et. al. v. Benson*, Civil Action 93-C-1063, the U.S. District Court for the Eastern District of Wisconsin ruled that the state does not illegally discriminate by not also paying for low-income pupils to attend sectarian or religious private schools.

#### **CHOICE EXPANDED TO MORE PUPILS**

**1993 Wisconsin Act 16** (1993 Senate Bill 44, biennial budget). Beginning in the 1994-95 school year, up to 1.5% (increased from 1%) of MPS membership may attend private, non-sectarian schools at state expense. The act also increased to 65% (from 49%) the proportion of a private school's enrollment which may consist of Choice students.

#### **CHOICE EXPANDED TO RELIGIOUS SCHOOLS**

**1995 Wisconsin Act 16** (1995 Assembly Bill 150, biennial budget). Private sectarian or religious schools allowed to participate in the program. In the 1995-96 school year, up to 7% of MPS students may receive state aid to enroll in private schools (increased from 1.5%), with up to 15% allowed to participate beginning in the 1996-97 school year. Tuition is paid via check to the private school after endorsement by the parent or legal guardian. It can equal the lesser of the state aid that MPS would have received per pupil or the school's educational cost per pupil. At parental request, pupils may be excused from participating in any school-sponsored religious activity. The act repealed the limitation that no more than 65% of a private school's enrollment could consist of Choice students.

#### **COURT ACTION RELATED TO ACT 16**

**Wisconsin Supreme Court Injunction Against Religious School Choice** – August 25, 1995. In response to several lawsuits and a petition from the state, the Wisconsin Supreme Court accepted original jurisdiction and issued a preliminary injunction staying implementation of religious school choice and the expansion of the number of pupils.

**Tie Vote in Wisconsin Supreme Court** – March 29, 1996. In *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, the Wisconsin Supreme Court split 3-3 with Justice Ann Walsh Bradley abstaining. This had the effect of remanding the case to the circuit court for further proceedings.

**Circuit Court Rules Religious School Choice Unconstitutional** – August 15, 1996. Dane County Circuit Court Judge Paul Higginbotham ruled that the amended Choice program violated Article I, Section 18, of the Wisconsin Constitution because it provided payments of money from the state treasury for the benefit of religious societies or seminaries. He held it violated the public and local bill prohibitions and the public purpose doctrine as it related to sectarian schools.

**Appeals Court Affirms Circuit Court** – August 22, 1997. In an opinion by Judge David Deininger, the Wisconsin Court of Appeals ruled that expanding Choice to sectarian or religious schools violated Article I, Section 18.

**Wisconsin Supreme Court Decides Religious Schools May Participate in Choice** – June 10, 1998. (*Jackson v. Benson*, 218 Wis. 2d 835, Case Number 97-0270) In a 4-2 decision (with

Justice Bradley not participating) the Supreme Court reversed lower courts, concluding that the expansion of Choice to religious schools does not violate the Wisconsin Constitution or the establishment of religion ("separation of church and state") clause of the U.S. Constitution. The decision, written by Justice Donald Steinmetz, also accepted the expansion of the number of pupils which may participate.

**Appeal to the Federal Courts Expected.** It is widely believed that the decision allowing the expenditure of taxpayer funds to support religious schools will be appealed to the federal courts and will likely reach the U.S. Supreme Court.

For further information, call the Department of Public Instruction at (608) 266-2853 or (800) 441-4563, extension 4.