Wisconsin Briefs from the Legislative Reference Bureau

Brief 98–15 Revised December 10, 1998

MILWAUKEE SCHOOL CHOICE VOUCHER PROGRAM: AN UPDATE

Extension of the Milwaukee Parental Choice Program to students enrolled in religious schools has survived legal challenges in both the Wisconsin and U.S. Supreme Courts. The program cleared the nation's highest court on November 9, 1998, when the federal justices declined, without comment, to hear an appeal stemming from the Wisconsin Supreme Court decision of June 10, 1998.

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

The Wisconsin court also held that the Choice program does not violate the U.S. Constitution's 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. Upon appeal, the U.S. Supreme Court declined to take jurisdiction, letting stand the Wisconsin court's ruling.

CURRENT PROGRAM PROVISIONS

In the 1990-91 school year, Wisconsin became 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 27 expanded the program to allow vouchers for children attending religious schools. Attendance at a religious school does not mean a pupil has to participate in sectarian instruction. Schools must honor a request by a parent or guardian that the student be excused from any religious activities sponsored by the school.

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) – or approximately 15,000 pupils – to attend any participating private school located within the city. About 6,200 pupils are currently attending private schools under the Choice option. Of these, approximately 4,000 are enrolled in religious schools, primarily Catholic schools.

A 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 that it may give preference to siblings of those already accepted.

In order for a child to be eligible, the total income of the pupil's family cannot exceed 175% of the poverty level established by the federal government. For the 1998-99 school year, the

Prepared by Dan Ritsche, Legislative Analyst

maximum allowable income for a family of three is $23,888 and for a family of four, $28,788. The Choice tuition checks, which are sent by the state to the designated private school, have to be endorsed by the pupil's parent or legal guardian for the use of the private school. Private schools must accept, as total payment for tuition, the lesser of the amount of 1) the state aid payment MPS would have received for the pupil if the child were enrolled in public school ($4,894 in 1998-99) or 2) an amount determined by the Wisconsin Department of Public Instruction (DPI) to be equal to the sum of the school's per pupil operating costs and any debt service expenses related to educational programming. In order to determine the latter amount, private schools are required to submit the results of an independent financial audit to DPI annually.

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

KEY LEGISLATIVE AND JUDICIAL ACTIONS

The Choice program, as created by 1989 Wisconsin Act 336, originally permitted up to 1% of MPS membership (grades K to 12) to attend private nonsectarian schools, beginning in the 1990-91 school year, but no more than 49% of an individual private school's enrollment could consist of Choice pupils. The Wisconsin Supreme Court upheld the Choice program as constitutional by a 4-3 decision on March 3, 1992. In that decision, *Davis v. Grover*, 166 Wis. 2d 501, the court reversed the appeals court (which had reversed the original circuit court decision supporting Choice) by ruling that the program was not a private or local law improperly enacted as part of the omnibus state budget bill and that the attempt to improve the educational opportunities of low-income Milwaukee students was an appropriate purpose for experimental legislation.

1993 Wisconsin Act 16 expanded the program, beginning in the 1994-95 school year, to allow up to 1.5% of MPS membership to attend private, nonreligious schools. It also allowed up to 65% of an individual school's enrollment to consist of Choice students.

Inclusion of private sectarian or religious schools in the program was authorized by 1995 Wisconsin Act 27. Up to 7% of MPS students could participate in Choice in the 1995-96 school year and up to 15% in subsequent years. The 1995 legislation also removed enrollment restrictions for individual schools.

In response to a constitutional challenge to the inclusion of religious schools, the Wisconsin Supreme Court on August 25, 1995, accepted original jurisdiction and issued a preliminary injunction preventing implementation of these provisions, but a 3-3 tie vote on March 29, 1996, had the effect of returning the case to circuit court. On June 10, 1998, following action in the lower courts, the Wisconsin Supreme Court ruled in *Jackson v. Benson*, 218 Wis. 2d 835, that Choice was constitutional. The U.S. Supreme Court declined to hear an appeal from the Wisconsin decision by an 8-1 vote on November 9, 1998.