

## LEGAL REVIEW NOTE

**Bill No.:** HB 423

**LC#:** LC2266, To Legal Review Copy, as of  
January 23, 2017

**Short Title:** Create special needs education savings  
accounts

**Attorney Reviewer:** Todd Everts/Julie Johnson

**Date:** January 28, 2017

### CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.*

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

#### Legal Reviewer Comments:

LC2266 establishes a Montana special needs education savings account program. The savings account can be used by a "qualified student" to purchase a variety of "allowable educational services." Sections 2 and 3. Services include "payment for tuition, fees, textbooks, software or other instructional materials or services to a qualified school." Section 3. The bill requires the Office of Public Instruction (OPI) to administer the program. Section 5. Funding for the program comes from a school district's general fund. Section 7. The bill requires the

superintendent of public instruction to withhold from the resident school district's BASE aid payments an amount that is withdrawn on a monthly basis and is the lesser of one-tenth of the district student amount or one-tenth of the annual statewide average district student amount. Section 7. OPI then places 95% of the funds into a private purpose trust fund for the qualified student to be used for allowable education expenses. Section 7. The remaining 5% of the funds are placed in an account to reimburse OPI for administrative expenses. Sections 7.

### Control of the State

LC2266, as drafted, may raise a potential constitutional conformity issue associated with Article V, section 11(5), of the Montana Constitution. Article V, section 11(5), provides: "No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not ***under control of the state.***" (Emphasis added.)

The potential constitutional conformity issue raised is whether the education savings account program as outlined in LC2266 is sufficiently "under the control of the state." LC2266 requires OPI to audit the program and ensure that the funds in the accounts are only being used on allowable expenses. LC2266 also requires OPI to establish rules to administer the program. Section 5. However, the legislation also provides that, apart from reporting requirements, a qualified school is "autonomous and is not an agent of the state or federal government." Section 6. LC2266 also provides that: "Neither the superintendent of public instruction or any other state agency may regulate the education program of a qualified school that enrolls an eligible student." Section 6.

The issue of "state control" has been discussed in prior Montana Supreme Court cases. For example, in *Grossman v. State*, 209 Mont. 427 (1984), the plaintiff contended that legislation authorizing the issuance of bonds for the department of natural resources and conservation's development of hydroelectric power violated Article V, section 11(5), because some private entities could benefit from cheap power. The Montana Supreme Court discounted this argument, stating: "The constitutional provision is not violated because the legislation may in making appropriations or other provisions in some way benefit incidentally various private individuals, associations or corporations not under the control of the state. As long as the provisions related to the expenditure of funds derived from the proceeds of the bonds are under the control of the state, the constitutional mandate is satisfied." *Grossman*, 209 Mont. at 455-56.

The Montana Supreme Court has concluded that public assistance to indigent expectant mothers is not an unconstitutional appropriation under Article V, section 11(5), simply because a mother may request the counseling and assistance of a private adoption agency. *Montana State Welfare Bd. v. Lutheran Social Services*, 156 Mont. 381, 390-91 (1971).

However, in *Hollow v. State*, 222 Mont. 478 (1986), the Montana Supreme Court considered legislation that permitted the use of in-state investment funds derived from taxation to guarantee loans or bonds of private individuals or entities was not permitted. According to the Court, the pledge of state credit to the benefit of private entities offended Article V, section 11(5), and was

constitutionally impermissible. *Hollow*, 222 Mont. at 485-86.

Consequently, the potential constitutional conformity issue rests on whether the proposed program, funded by the general fund of a school district, which in turn is partially funded by an appropriation of the general fund of the state of Montana, is sufficiently under the control of the state for the mandate of Article V, section 11(5), to be satisfied.

### Aid to Sectarian Schools

LC2266, as drafted, may also raise potential constitutional issues associated with Article X, section 6, of the Montana Constitution. Article X, section 6, provides:

**Section 6. Aid prohibited to sectarian schools.** (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

In *State ex rel. Chambers v. School District No. 10*, 155 Mont. 422 (1970)<sup>1</sup>, the Montana Supreme Court considered whether a payment of funds by a public school board for the employment of teachers in a private school violated the Montana Constitution. The school board contended that the local parochial school was an "integral and important part of the public and private education system" which "complied with standards set by the superintendent of public instruction" and thus "pursued a secular function in addition to its sectarian function." *State ex rel. Chambers*, 155 Mont. at 430. The Supreme Court ruled that the payments were a violation of the principle of separation of church and state and therefore unconstitutional. *Id.*

However, in *Montana State Welfare Bd.*, the Montana Supreme Court concluded that public assistance to an indigent expectant mother, which could possibly be later distributed to a religiously affiliated adoption agency, did not "directly or indirectly benefit" the adoption agencies. *Id.*, 156 Mont at 391.

Under Section 2(5) of LC2266, "qualified school" means a nonpublic school serving any combination of grades kindergarten through 12. LC2266, as drafted, authorizes a parent of a child enrolled in a Montana special needs education savings account program to personally expend money deposited in the account for purposes of purchasing allowable educational services from a nonpublic school. Section 3. The potential constitutional conformity issue raised pursuant to Article X, section 6, of the Montana Constitution is whether and to what extent the payments from the special needs education savings accounts benefit a secular or sectarian

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<sup>1</sup> Both *Montana State Welfare Bd.* and *State ex rel. Chambers* precede the 1972 Constitutional Convention; however, the provisions in question are nearly identical.

purpose.

**Requester Comments:**