

## LEGAL REVIEW NOTE

**Bill No.:** SB 390

**LC#:** LC2211, To Legal Review Copy, as of January 29, 2023

**Short Title:** Provide freedom in school choice

**Attorney Reviewers:** Todd Everts/Jaret Coles

**Date:** February 17, 2023

### 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:

SB 390 establishes the "Equality of Educational Opportunity Act" (the "Act"). Section 1. The Act creates a Montana equality of educational opportunity education savings account program. Under the program, the parents of a qualified student sign a contract with the superintendent of public instruction that releases "the resident school district from all obligations to educate the qualified student for as long as the student participates in the program, including any requirements that the district provide a free and appropriate education to the qualified student or develop an individualized education program for the qualified student." Section 5(1)(b).

Following the receipt of a signed contract, the office of superintendent of public instruction ("OPI") notifies the resident school district of the student's participation in the program. Section 9(1). OPI also informs the district of the amount of money the school district must remit monthly to OPI because the district is no longer obligated to educate the student. Section 9(2). Ninety-eight percent of the amount received by OPI is placed in an "educational opportunity education savings trust" and 2% is placed into an administration account for OPI. Sections 9(4) and 9(8). The school district remits that amount to OPI from August through May for as long as the student participates in the program. Section 9(2).

The money remitted by the school district "must be from the district's general fund" and "may not include revenue from the guarantee account provided for in 20-9-622." Section 9(3). Money in the education savings trust accounts can be used by a parent to purchase "allowable educational resources". Allowable educational resources include:

- qualified school tuition, fees, textbooks, software, or other instructional materials or services;
- an educational program or course using electronic or offsite delivery methods, including but not limited to tutoring, distance learning programs, online programs, and technology delivered learning programs;
- curriculum, including supplemental materials necessary for the curriculum;
- tutoring;
- educational therapies or services, including but not limited to occupational, behavioral, physical, speech-language, and audiology therapies from licensed or certified practitioners or providers, including licensed or certified paraprofessionals or educational aides;
- state or nationally recognized assessment tests, advanced placement exams, entrance examinations at an eligible postsecondary institution, or other assessment instruments;
- services provided by a public school in the state, including individual classes and extracurricular activities;
- eligible postsecondary institution tuition, books, online courses, or other fees;
- no more than \$500 annually in consumable education supplies, including but not limited to paper, ink, pens, and markers;
- transportation required for another allowable educational service;
- fees paid to a cooperative educational program; and
- any other educational expense approved by the superintendent of public instruction.

Section 4(1). Parents "have the freedom to expend account funds for the purchase of allowable educational resources for a participating student". Section 9(6)(a). On "a student's 24th birthday, the student's account is closed and any remaining funds in the student's account are returned to the guarantee account described in 20-9-622. If a student is enrolled in a postsecondary institution on the student's 24th birthday, the account must remain active until the student is no longer enrolled in a postsecondary institution." Section 9(6)(b).

## Prohibited Payments

SB 390, as drafted, may raise potential constitutional issues associated with Article VIII, section 14, of the Montana Constitution. Article VIII, section 14, provides: "Except for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof."

There is no appropriation to a state agency for withdrawals by parents from the educational opportunity education savings trust. The question is whether money in the trust can be paid without an appropriation.

In the past, the Supreme Court has ruled that Article VIII, section 14, does not apply to certain funds that are "not derived by taxation." For example, in *Huber v. Groff*, 171 Mont. 442, 558 P.2d 1124 (1976), the plaintiff challenged the Housing Act of 1975, which allowed for the issuance of revenue bonds. The Housing Act provided that proceeds from the bond sales would be placed in trust and "handled by a trustee". The plaintiff argued that the sale of bonds and the use of trust indenture funds without an appropriation violated Article VIII, section 14. The Montana Supreme Court, however, disagreed, holding that Article VIII, section 14, did not apply to the trust indenture funds because: (1) the trust indenture funds did not derive from taxation; and (2) they were not deposited with the state treasurer. *Huber*, 171 Mont. at 460.

The *Huber* Court explained: "Section 14 relates to the method of handling the deposits of (f) state monies. The money raised here by the sale of bonds becomes a special fund to be disbursed for the erection of proposed buildings. This money is not derived by taxation and consequently need not be handled in that manner." *Id.*, quoting *Geboski v. Montana Armory Board*, 110 Mont. 487, 493, 103 P.2d 679, 682 (1940).

In the proposed legislation, OPI is depositing money from a resident school district into "accounts within the equality of educational opportunity education savings trust ... to be used only for the purchase of allowable educational resources". Section 9(4)(a). Although the proposed legislation provides that the money remitted to OPI is from a school district's general fund, and therefore it could be argued the money is not state money, this money is, in large part, "derived from taxation". Therefore, paying tax dollars from the trust to reimburse parents without an appropriation may potentially implicate Article VIII, section 14.

## Control of the State

SB 390, as drafted, may also 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.)

As stated in the section above, there is a question whether money in the trust must be appropriated. If so, the potential constitutional conformity issue raised is whether the Montana

equality of educational opportunity education savings account program as outlined in the legislation is sufficiently "under the control of the state." Under the program, a parent is entitled to use money that derived from property taxes to pay for allowable educational resources, which includes payments made to nonpublic school or home school. Sections 3(6) and 4)(1)(a). The legislation also provides that, apart from reporting requirements, a qualified school is "not an agent of the state or federal government." Section 8(1). The legislation also provides that the "superintendent of public instruction or any other state agency may not regulate the educational program of a qualified school that enrolls a qualified student, except as provided under 20-5-109." Section 8(2).

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.

The legislation, as drafted, requires OPI to administer a program that disperses tax money collected under the authority of state law to private individuals for making payments to a private entity that is expressly not under the control of the state. While the legislation also makes clear that the monthly remittance may not include revenue from the guarantee account provided for in 20-9-622, there may be other state dollars in a school district's general fund being used to reimburse parents for payments to a qualified school that is not under the control of the state, which may potentially implicate Article V, section 11(5).

**Requester Comments:**